TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1924

No. [redacted] 319

THE UNITED STATES, APPELLANT,

vs.

P. LORILLARD COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 10, 1924.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 873.

THE UNITED STATES, APPELLANT,

vs.

P. LORILLARD COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

1 Court of Claims of the United States of America.

P. LORILLARD COMPANY, A CORPORATION, petitioner,
vs.
THE UNITED STATES OF AMERICA, respondent.
Case No. B–106.

I. *Petition.*

Filed May 23, 1922.

To the Honorable, the Judges of the Court of Claims of the United States of America, sitting at Washington, D. C.

Comes now the P. Lorillard Company, the petitioner above named, by its attorneys, and respectfully represents and shows unto the court and alleges:

1. That your petitioner is now and at all times hereinafter mentioned has been a corporation duly organized and existing under the laws of the State of New Jersey and a citizen of the United States of America, resident within the State of New Jersey, and has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or
2 given encouragement to rebellion against the said Government of the United States.

2. That your petitioner is now and at all times hereinafter mentioned has been engaged in the manufacture of cigarettes and other tobacco products for export as well as for domestic consumption.

3. That between August 29 and November 21, 1919, your petitioner exported 153,050,000 cigarettes manufactured by it and known by the trade name or brand of "Nebo" upon which taxes had been paid to the United States Government in the following amounts and in the manner hereinafter described, that is to say:

(a) As required by section 3394, United States Revised Statutes (as amended March 3, 1875, July 24, 1897, July 1, 1902, and August 5, 1909), and in full compliance with the regulations of the Treasury Department prior to the passage of the revenue act of 1917, your petitioner paid the tax then in force of $1.25 per thousand, which tax was paid by the purchase of the necessary stamps and by attaching same to the original packages containing said cigarettes before they were removed from the factory.

(b) As required by the revenue act of 1917, approved October 3, 1917 (c. 63, sec. 400, 40 St. 312), and in full compliance with the regulations of the Treasury Department in force after the passage of said revenue act of 1917, your petitioner, before the withdrawal of said cigarettes from the factory, paid an additional tax of 80 cents per thousand but without purchasing or attaching any additional stamps.

(c) After the aforesaid taxes aggregating $2.05 per thousand had been paid and said cigarettes had been removed from the factory,

the revenue act of 1918 (approved February 24, 1919) was passed, which imposed a tax on cigarettes of $3.00 per thousand in
3 lieu of the internal revenue taxes then imposed by law. Said cigarettes being in the possession of your petitioner on the effective date of this act, the additional sum of 95 cents per thousand (as provided by sections 700 and 702 of said act) was in due course paid, making a total tax paid on said cigarettes of $3.00 per thousand.

4. Following the exportation of said cigarettes made in compliance with the regulations of the Treasury Department as regards the cancellation of stamps and in all other respects, your petitioner filed with the Treasury Department claim for drawback or refund under section 3386, United States Revised Statutes, of the total amount of internal-revenue taxes paid thereon at $3.00 per thousand, submitting therewith due proof as required. Petitioner's claim for drawback was allowed to the extent of $2.05 per thousand covering taxes paid prior to the passage of the revenue act of 1918, and refund of said taxes to that extent was duly made. Its claim for drawback of the remaining 95 cents per thousand paid after the passage of the revenue act of 1918 (as set forth in subdivision (c) of paragraph 3 of this petition), amounting to the sum of $145,397.50, was disallowed and the Commissioner of Internal Revenue has refused and still refuses to make refund of this amount.

5. Your petitioner claims that it is entitled to a refund of this amount under authority of the laws of the United States and particularly under authority of section 3386, United States Revised Statutes, and section 1310 (c) of the revenue act of 1918.

6. That your petitioner is the sole and absolute owner of said claim and that no other person, corporation, firm, or individual has any interest whatsoever therein. That your petitioner is justly entitled to the amount herein claimed from the United States
4 of America after allowing all just credits and offsets, and that no assignment or transfer of said claim, or of any part thereof, or interest therein, has ever been made to any one; and that it believes the facts as stated herein to be true.

Wherefore your petitioner prays judgment against the United States of America for the amount of $145,397.50, together with interest thereon, for its costs in this behalf expended, and for such other, further and different relief as to the court may seem meet and equitable in the premises.

P. LORILLARD CO.,
(Signed) By P. J. HANLON, *Vice Pres.*
(Signed) M. C. ELLIOTT,
(Signed) W. B. BELL,
Attorneys for Petitioner.

(Signed) M. C. ELLIOTT,
Attorney of Record,
635 Southern Bldg., Washington, D. C.

5 [Jurat showing the foregoing was duly sworn to by P. J. Hanlon. Omitted in printing.]

6 II. *General traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises having been entered on the part of the defendant, a general traverse is entered as provided by rule 34.

III. *Argument and submission of case.*

On October 16, 1923, this case was argued and submitted on merits by Mr. Milton C. Elliott for the plaintiff and by Mr. Fred K. Dyar for the defendant.

7 IV. *Findings of fact, conclusion of law, and opinion of the court by Campbell, Ch. J.*

Entered October 29, 1923.

This case having been heard by the Court of Claims, upon a stipulation of the facts by the parties, made on behalf of the plaintiff by its attorney, and on behalf of the United States by Robert H. Lovett, Esq., Assistant Attorney General, the court makes the findings of fact as stipulated and as follows:

I.

Petitioner is a corporation created under the laws of the State of New Jersey, is a citizen of the United States, a resident of New Jersey, has been and is engaged in the manufacture of cigarettes and other tobacco products for export as well as for domestic consumption as set forth in paragraphs (1) and (2) of the petition filed in this case.

II.

Early in August, 1919, petitioner had an opportunity to export and sell 153,050,000 cigarettes manufactured by it known by the trade name or brand of "Nebo," upon which taxes had been paid to the United States in the following amounts and under the circumstances set forth:

(a) As required by section 3394, U. S. R. S., petitioner had paid the tax then in force of $1.25 per thousand, which tax was paid by the purchase of the necessary stamps and by attaching them to the original packages before the cigarettes were removed from the factory.

(b) As required by the revenue act of 1917, approved October 3, 1917, petitioner had paid an additional tax of 80 cents per thousand but without purchasing or affixing any additional stamps, it not being customary under the regulations and practices then in force to require the purchase of additional stamps.

(c) After the aforesaid taxes, aggregating $2.05 per thousand, had been paid and after the cigarettes had been removed from the factory the revenue act of 1918, approved February 24, 1919, was passed, which imposed a tax on cigarettes of $3.00 per thousand in lieu of the internal-revenue taxes then imposed by law. These cigarettes being in the possession of petitioned on the effective date of
8 this act a further tax of 95 cents per thousand was paid, making a total tax paid on the cigarettes of $3.00 per thousand. The last sum (of 95 cents per thousand) was not paid immediately upon the passage of the revenue act of 1918, approved February 24, 1919, but under the practices then in force a bond was given to secure its payment and the tax was paid at a subsequent date.

III.

On or about August 5, 1919, after the tax of $2.05 per thousand had been paid on the cigarettes and bond had been given for the tax of 95 cents per thousand assessed under the act of 1918, petitioner's representative conferred with the Solicitor of Internal Revenue at Washington and asked for a ruling on the question whether the tax of $3.00 paid on these cigarettes would be refunded should such cigarettes be exported. It was explained to the solicitor that the ability of petitioner to fix a price which would enable it to consummate the sale and export these cigarettes was dependent upon whether or not petitioner would be allowed a refund or drawback of the taxes paid. Statements made at this conference were confirmed in writing by letter dated August 6, 1919, reading as follows:

AUGUST 6, 1919.
WIH

MR. P. A. VIZE, *Solicitor,*
Internal Revenue Department,
Washington, D. C.

DEAR SIR: Referring to our conversation in Washington yesterday regarding the question of drawback on certain cigarettes held by the P. Lorillard Company which it now contemplates exporting for sale in Belgium:

For the benefit of your records I now give you, as suggested, a brief statement of the facts, as follows: This company had on hand a quantity of "Nebo" cigarettes manufactured and removed from its factories prior to the passage of the revenue act of 1918. There are affixed to these packages proper internal-revenue stamps, for which the company has paid the Government, under the then existing revenue act, at the rate of $2.05 per thousand cigarettes. These cigarettes were inventoried by the company in its return of tobacco products on hand and held for sale at the effective date of that act for the purpose of the levy of the additional so-called "floor tax" imposed by section 702 of the act, and for the payment of such additional tax (amounting to 95 cents per thousand cigarettes) the com-

pany has given its bond, secured by a deposit of Liberty bonds, in accordance with the requirements of the Internal Revenue Department. This additional tax has not yet been paid, but by the terms of the bond mentioned is due and payable in the latter part of September, 1919.

The company now has an opportunity and desires to sell these cigarettes in export trade, but, naturally, its ability to fix a price which will enable it to consummate the transaction is dependent upon whether or not it will be entitled to an allowance of drawback, after the additional tax has been paid and the exportation completed, equal in amount to the full tax of $3.00 per thousand paid.

9 For the reasons pointed out to you in person yesterday, it seems to us clear—

1. That the expression "on which the tax * * * has been paid by suitable *stamps affixed thereto* before removal from the place of manufacture," as used in the drawback statute (R. S. 3386), should be construed in the light of the fact that at the date of its passage the only taxes then in force on such products were out and out stamp taxes;

2. That the additional tax imposed by section 702 of the revenue act of 1918, while called a "floor tax," is in reality a stamp tax (as is shown by the method of computation prescribed by that section itself), its payment really serving to increase *pro tanto* the "value" of the stamps theretofore affixed to the package of cigarettes upon which such additional tax applies, and that this interpretation can fairly, and should under the circumstances, be given effect in construing the drawback statute and the revenue act of 1918;

3. That the words "* * * When the same are exported, equal in amount to the value of the stamps found to have been so affixed," used in the drawback statute means the value, at the time of exportation, of the stamps affixed and not the value of the stamps at the time they were affixed; and

4. That, consequently, after the cigarettes in question are sold in export trade by the company, it is entitled either to an allowance of drawback to the extent of $2.05 per thousand and credit against the bond it has given to the extent of the remaining 95 cents per thousand or, upon payment of the bond in full, to an allowance of drawback amounting to the full $3.00 per thousand, depending upon whether it is considered that the exportation of these goods removes them from the stock of the company, "held and intended for sale."

Otherwise the effect will be that cigarettes manufactured and removed from the factory on February 26, 1918, and subsequently exported will be allowed drawback at the rate of $3.00 per thousand, whereas identical cigarettes manufactured by the same company and removed from the factory on February 24, 1918, when subsequently exported, will be entitled to drawback of only $2.05 per thousand, and this in spite of the fact that on each lot of cigarettes

the company has paid to the Government the same amount of tax per thousand, viz. $3.00. Manifestly, it was not the intention of the drawback statute to produce any such result.

As stated by you, the sale contemplated must be negotiated at once if it is to be effected at all. Therefore, I very much hope that you will be able to let us have a decision on this matter not later than to-morrow, and beg to assure you that your prompt attention will be greatly appreciated.

Yours very truly,

SAML. B. WOODS, JR.

IV.

On August 19, 1919, petitioner contracted for the sale and export of the cigarettes. At that time it had received no response to letter of August 6 above set forth.

10

V.

On August 22, 1919, Mr. J. H. Callan, acting commissioner, wrote petitioner as follows:

T-RDB-79-65.

TREASURY DEPARTMENT,
Washington, August 22, 1919.

P. LORILLARD COMPANY,
119 West 40th Street, New York, New York.

SIRS: Reference is made to visit of your representative, Mr. Saml. B. Woods, jr., August 5th, and letter of the following date in regard to the question of allowance for drawback on certain cigarettes held by your company, which it is contemplated exporting to Belgium. It appears that these cigarettes were manufactured and removed from factory prior to the passage of the revenue act of 1918 and tax paid at the rate of $2.05 per thousand; that they were included in inventory and return of floor stocks on hand February 25, 1919, and bond given to secure payment of the additional tax of 95 cents per thousand imposed by section 702 of the new act, which tax becomes due and payable in September of this year.

You state that the opportunity has been presented to market these cigarettes in export trade, but that your ability to fix a price which will enable you to consummate the transaction is dependent upon your being entitled to an allowance of drawback after the additional tax has been paid and exportation completed of an amount equal to the full tax of $3 per thousand. Your contention for allowance of drawback of the full $3 rate is based on the language of the statute providing that allowance of drawback shall be "equal to the value of the stamps found to have been so affixed."

You state that in spite of the increased tax on cigarettes imposed by the act of February 24, 1919, the same stamps are being used as

formerly, the stamps on hand having been inventoried and manufacturers required to pay the difference between the old and new prices for such stamps, and floor tax thereby operates to make the value of the stamps which were attached equal to the value of similar stamps purchased at the new rate and attached after the passage of the act of 1918. Therefore, you feel that refund of the whole amount paid, including the floor tax, should be made.

In reply you are advised that it would be desirable to make refund of the amount of floor tax to be paid on the cigarettes in question could it be done, but it is not believed that the argument presented furnishes a sound basis for such action. It is manifest from a reading of the floor-tax sections of the statute that they were not intended to work any increase in the value of stamps previously attached.

The drawback provisions relating to such merchandise are contained in section 3386, Revised Statutes, which, as amended by section 16 of the act of March 1, 1897, reads in part:

"There shall be an allowance of drawback on tobacco, snuff and cigars on which the tax has been paid by suitable stamps affixed thereto before removal from the place of manufacture, when the same are exported, equal to the value of the stamps found to have been so affixed."

11 The floor tax is an additional tax independent of and separate from the taxes previously paid. It does not increase the amount of the original tax nor does it increase the amount originally paid for stamps. The stamps represent only the amount originally paid, and their "value," within the meaning of the drawback statute, would seem to be the amount thus paid.

It has been held in previous cases that statutes extending a privilege should be strictly construed and that "whoever claims a privilege from the Government should point to a statute which clearly indicates a purpose to grant the privilege."

It is impossible in the case in question to point to a statute clearly indicating the purpose to grant the privilege of drawback of floor tax. It is only by a forced and strained construction of the language of the drawback statute that it can be regarded as covering floor tax, and it therefore is necessary to conclude that drawback privilege does not extend to floor taxes. The amount paid as such under section 702 of the revenue act of 1918 could not be included in allowance for drawback on cigarettes sold for export.

Respectfully,

(Signed) J. H. CALLAN,
Acting Commissioner.

VI.

The actual exportation of the cigarettes began on August 29 and was completed November 21, 1919.

VII.

Sundry formal claims for drawback were filed with the Commissioner of Internal Revenue on the regularly prescribed forms. Each of these claims (about 31 in number) contained the following notation:

"The tax covered by this claim has been paid as follows:

"The stamps affixed to the packages were purchased at the rate of $2.05 per thousand cigarettes. The additional 95 cents per thousand represents so-called floor tax as per return filed with the collector of the third district of New York, March 26, 1919. Bond secured by deposit of United States Liberty bonds in the amount of $482,000 has been given for the payment of this additional tax within seven months from the passage of the revenue act of 1918, at which time it will be paid by this company."

VIII.

After consideration of several of these claims the deputy commissioner, James M. Baker, under date of March 15, 1920, issued the following ruling in the form of a letter to the collector of internal revenue, second district, New York:

T&M–OFM.
CI–TD–214–229–235–238.

TREASURY DEPARTMENT.
Washington, March 15, 1920.

COLLECTOR OF INTERNAL REVENUE,
Second District,
New York, N. Y.

This office has passed for allowance and forwarded to the Auditor for the Treasury Department for settlement twenty claims
12 filed with you by P. Lorillard Co., 18 of them for $15,000 each, one for $19,050, and one for $9,150 drawback of internal-revenue taxes paid on cigarettes exported to Antwerp, covered by bonds bearing the followings customs entry numbers: 2061, 2062, 2063, 2245, 2246, 2247, 2248, 2249, 2540, 2541, 2542, 2543, 2544, 2545, 2623, 2624, 5230, 5231, 5232, 5233.

Your attention is called to the fact that the rate of tax claimed in each of these bonds was $3.00 per thousand, but in slips attached to the bonds and other claim papers it is shown that 95 cents in each case was floor tax. As the law provides only for drawback of taxes paid for stamps and does not provide for drawback of floor taxes, the 95 cents has been deducted in each case, and the claims have been allowed at the rate of $2.05 per thousand, amounting in the case of the $15,000 claims to $10,250 each, in the case of the $19,050 claim to $13,017.50, and in the case of the $9,150 claim to $6,252.50.

You are requested to notify the claimants of these allowances and the changes made in the amounts, and to further state that the

same action will be necessary on the other claims from the same claimant still pending in this office awaiting the outcome of correspondence with you concerning them, which you state in your letter of the 9th instant, received on the 11th, are having attention.

(Signed) JAMES M. BAKER,
Deputy Commissioner.

McK.

IX.

Pursuant to this ruling the tax of $2.05 per thousand has been refunded to petitioner, but the tax of 95 cents per thousand which was subsequently paid by petitioner has not been refunded.

X.

The claim for refund or drawback of the tax of 95 cents per thousand was appealed to the Commission of Internal Revenue and argued on brief. Under date of February 28, 1921, the acting commissioner in a letter addressed to counsel for petitioner ruled as follows:

T&M–PJM.
Cl–TD–214–229–235–238.

TREASURY DEPARTMENT,
Washington, Feb. 28, 1921.

MILTON C. ELLIOTT, Esq.,
Southern Building,
Washington, D. C.

MY DEAR JUDGE ELLIOTT: This is in reference to contentions made by you in brief and oral argument that the provisions of section 3386, R. S., warrant allowance of drawback of amounts assessed and paid, under section 702 of the revenue act of 1918, on cigarettes, which cigarettes were exported subsequent to the date of imposition of the tax.

As I understand it, your argument centers upon two main propositions: (1) That section 702 does not impose an independent tax but is the same tax as that imposed by section 700, differing merely in method of collection; and (2) that section 3386, R. S., does not grant a privilege of statutory exemption from taxation and
13 consequently should not be strictly construed. Decision of the question raised, of course, depends upon the effect which should be given the language of section 3386, R. S.

Section 700 (a) so far as here material provides:

"That upon cigars and cigarettes manufactured in or imported unto the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid under the provisions of existing law, in lieu of the internal-revenue taxes now imposed thereon by law, the following taxes, to be paid by the manufacturer or importer thereof."

Section 702 provides:

"That upon all the articles enumerated in section 700 or 701, which were manufactured or imported, and removed from factory or customhouse, on or prior to the date of the passage of this act, and upon which the tax imposed by existing law has been paid, and which are, on the day after the passage of this act, held by any person and intended for sale, there shall be levied, assessed, collected, and paid a floor tax equal to the difference between (a) the tax imposed by this act upon such articles according to the class in which they are placed by this title, and (b) the tax imposed upon such articles by existing law other than section 403 of the revenue act of 1917."

In order to ascertain the amount of tax imposed by the latter section and the kinds of articles subject thereto, it is necessary to read it in connection with section 700, and also section 701; but I can not accept this as a conclusive or even persuasive indication that the tax under section 702 is the same tax as that imposed by section 700. Section 700 imposes a tax, in lieu of the tax theretofore imposed, *upon articles not previously removed* to be paid *by the manufacturer or importer when sold or removed*. Section 702 imposes a further tax *upon tax-paid articles which had theretofore been removed*, to be paid by *any person* holding the same for sale. Section 700 imposes the tax upon articles *manufactured or imported and sold or removed*. Section 702 imposes a tax upon articles *held and intended for sale*, and this is designated as a "floor tax." Thus the tax under section 702 differs from that under section 700 both in regard to the persons who must pay the same and the status of the articles with reference to which it is imposed. While the former refers to the latter for determination of the *kinds* of articles which are subject to the tax, no *article* which is subject to tax under section 700 could be subjected to tax under section 702. Furthermore, the tax under the latter section is to be "assessed," while that under the prior section is to be paid by stamp. In Patton v. Brady, 184 U. S. 608, a tax almost identical in nature with that here in question was attacked very vigorously on the ground that an article once having been subjected to an excise may not be subjected to a second excise.

Exception is taken to the position of this office that section 3386, R. S., constitutes a privilege of statutory exemption from taxation. That section provides in part:

"There shall be an allowance of drawback on tobacco, snuff, and cigars on which the tax has been paid by suitable stamps affixed thereto before removal from the place of manufacture, when the same are exported, equal in amount to the value of the stamps found
14 to have been so affixed, the evidence that the stamps were so affixed, and the amount of tax so paid, and of the subsequent exportation of the said tobacco, snuff, and cigars to be ascertained under such regulations as shall be prescribed by the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury."

This section is not in the form of a specific exemption from taxation, but is designed to provide for the return of taxes lawfully collected. If the principle that one who "claims a privilege from the Government should point to a statute which clearly indicates a purpose to grant the privilege," applies in the case where one urges such privilege as a reason for noncollection of a tax, it certainly applies with equal force where return of a tax theretofore lawfully collected is sought. The only basis for a claim that section 3386, R. S., does not grant a statutory privilege of exemption from taxation must be found in a contention that failure to allow such drawback would result in the imposition of a tax upon exports contrary to the constitutioaal prohibition against taxation of articles exported. That this result would not obtain is clear from a series of decisions of the Supreme Court. In Turpin v. Burgess, 117 U. S. 504, attack was made upon the requirement that an exportation stamp be purchased and affixed to every package of tobacco intended for exportation on the ground that it resulted in taxation of articles exported contrary to the constitutional inhibition. In denying the applicability of this constitutional provision the court took occasion to state that, by the exemption of such tobacco from excise paid on account of other tobacco, "a special indulgence was granted to them." And in Cornell v. Coyne, 192 U. S. 418, it was held that an excise upon all filled cheese manufactured must be paid on filled cheese manufactured expressly for export. The whole subject is summarized in Peck v. Lowe, 247 U. S. 165, where the court said:

"*If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are*, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws."

While, therefore, the opinion is entertained that the drawback provisions of section 3386, R. S., constitute a privilege conferred by Congress and not a recognition of any constitutional right to exemption from taxation, and should be strictly construed, irrespective of such rule a proper construction of that section precludes allowance of drawback for amounts paid under section 702. The allowance is a drawback on tobacco "on which *the tax has been paid by suitable stamps affixed thereto before removal from the place of manufacture*" and is to be "*equal in amount to the value of the stamps found to have been so affixed.*" The evidence that the "*stamps were so affixed*" and the "*amount of tax so paid*" is to be ascertained under regulations prescribed by the commissioner. The tax under section 702 is not "paid by suitable stamps" but is paid by assessment. It is not paid before removal, but after removal. And the assessment is not made upon the basis *of stamps* owned or held by the manufacturer, but is made upon the basis of *articles held*.

Whatever may be contended in regard to an automatic increase in the value of stamps because of assessments paid on such stamps prior to the removal of the articles to which they are affixed, it is not perceived how an assessment, the basis of which is not the possession of stamps but the possession of certain articles, made after removal, can work any increase in the value of the stamps.

I am forced to conclude that existing provisions of law do not authorize return of taxes assessed and collected under section 702 because the articles in connection with which the tax was assessed were subsequently exported, and am constrained not to reopen the case of P. Lorillard Company, which is dealt with in your brief.

Respectfully,

(s.) PAUL MYERS,
Acting Commissioner.

XI.

Under date of October 20, 1921, counsel for petitioner in requesting reconsideration of the foregoing ruling addressed the following letter to the Commissioner of Internal Revenue:

OCTOBER 20, 1921.

Hon. DAVID H. BLAIR,
Commissioner of Internal Revenue,
Washington, D. C.

Claim for drawback of taxes erroneously or illegally withheld from P. Lorillard Company, tobacco manufacturers, 119 West 40th Street, New York City. Your file T&M–PJM–Cl–TD–214–229–235–238.

DEAR SIR: I am inclosing herewith copy of office letter dated February 28, 1921, signed by Mr. Paul Myers, acting commissioner, disallowing the above claim. From this you will observe that the disallowance is based upon the department's interpretation of section 3386, Revised Statutes. No consideration was given to subdivision C of section 1310 of the revenue act, 1918, which reads as follows:

"(c) Under such rules and regulations as the commissioner, with the approval of the Secretary, may prescribe, the taxes imposed under the provisions of Titles VI, VII, or IX shall not apply in respect to articles sold or leased for export and in due course so exported. Under such rules and regulations the amount of any internal-revenue tax erroneously or illegally collected in respect to exported articles may be refunded to the exporter of the article, instead of to the manufacturer, if the manufacturer waives any claim for the amount so to be refunded."

This statute was not discussed nor referred to at any hearing or conference at which this claim was considered and was evidently overlooked. Claimant very confidently relied upon the statutes referred to in the brief filed in this case.

In view of the very obvious importance of this statute in the case under consideration, I am writing to ask that this case be reopened

and that claimant be given an opportunity to file a supplemental brief or be given an oral hearing.

Your favorable consideration of this request will be very sincerely appreciated.

Respectfully,

(s.) M. C. ELLIOTT,
Of Counsel for Claimant.

mce–rrf.

16 XII.

In reply the following letter was received from Deputy Commissioner F. G. Matson, dated November 4, 1921:

T–RDB.
Cl–TD–214–229–235–238.

TREASURY DEPARTMENT,
Washington, November 2, 1921.

MR. MILTON C. ELLIOTT,
Southern Building,
Washington, D. C.

SIR: Acknowledgment is made of receipt of your letter of October 20th, inclosing copy of letter addressed you under date of February 28, 1921, in which you were advised of the inability of this office to favorably consider claims filed by the P. Lorillard Company, 119 West 40th Street, New York City, for drawback of floor taxes paid under section 702 of the revenue act of 1918. You state that these rejections were based upon interpretations of section 3386, R. S., and that at that time no consideration was given to subdivision C of section 1310 of the revenue act of 1918.

You request that the case be reopened and that you be given an oral hearing or an opportunity to file a supplemental brief based on the section mentioned.

In reply, you are advised that as explained in office letter of February 28th, there is no authority of law for allowance of drawback of floor taxes under the provisions of section 3386, R. S. However, P. Lorillard Company are privileged to file claim on Form 46 for refund of the amounts of floor tax involved, in connection with which any supplemental brief submitted by you will be given due consideration. At the same time, if desired, arrangements may be made for an oral hearing on the subject.

Respectfully,

(sgd.) F. G. MATSON,
Deputy Commissioner.

HES."

XIII.

A copy of petitioner's request for reconsideration having been forwarded to the Solicitor of Internal Revenue, the following reply was received, dated November 4, 1921:

SOL:1:11:JDF.
31-1-1.

DEPARTMENT OF JUSTICE.
OFFICE OF THE SOLICITOR OF INTERNAL REVENUE.
Washington, November 4, 1921.

(Copy of letter on file with Bureau of Internal Revenue, dated Nov. 5, 1921.)

MILTON C. ELLIOTT, Esq.,
Southern Building,
Washington, D. C.

SIR: Receipt is acknowledged of your letter dated October 26, 1921, inclosing a copy of a letter addressed by you to the commissioner, in which you call his attention to the provisions of
17 section 1310 (c) of the revenue act of 1918 as giving P. Lorillard Company the right to a refund of the amount of floor tax paid upon certain tobacco which was subsequently exported. You state that this section was not considered at the hearing on the taxpayer's claim, nor was it treated in your brief. You ask that this office recommend that the case be reopened, or that, in any event, you be permitted to file a supplementary brief in support of your contention.

It is thought that section 1310 (c) does not apply to your particular case, and this office does not, therefore, see its way clear toward recommending that the claim be reopened. Any brief you may care to submit, however, will receive close and careful attention, and if, after consideration, it is thought that the action of the bureau in rejecting the claim was erroneous, the reopening of the claim will be recommended.

Respectfully, (Signed) CARL MAPES,
Solicitor.
BL.

XIV.

Claim for refund was again argued on brief in connection with the request for reconsideration of the commissioner's former ruling disallowing the claim for drawback. Under date of March 8, 1922, the commissioner, in ruling upon the request for reconsideration, wrote counsel for petitioner as follows:

SOL:1.11:JDF.
31-1-1.

TREASURY DEPARTMENT,
Washington, March 8, 1922.

MILTON C. ELLIOTT, Esq.,
Southern Building,
Washington, D. C.

SIR: Reference is made to the claim of P. Lorillard Company, 119 West 40th Street, New York, N. Y., for the refund of $145,397.50, floor tax paid under section 702 of the revenue act of 1918 upon 153,050,000 "Nebo" cigarettes which were subsequently exported by the taxpayer.

These cigarettes were manufactured and removed prior to February 25, 1919, and stamps of the value of $2.05 per thousand were affixed. On the date above mentioned the cigarettes were held by the taxpayer and intended for sale, and hence became subject to the floor tax of $0.95 per thousand imposed by section 702 of the revenue act of 1918.

Early in August, 1919, the taxpayer had an opportunity to sell a large quantity of its cigarettes abroad. A contract was made with the foreign purchaser and the order was filled by the shipment of the cigarettes in question, exportation being begun on August 29, 1919, and completed November 21, 1919. The taxpayer made proof of exportation and applied, under section 3386, R. S., for a drawback of the internal-revenue taxes paid on these cigarettes at the rate of $3.00 per thousand. The claim for drawback was allowed to the extent of $2.05 per thousand (the amount of taxes paid by stamps), but was rejected to the extent of $0.95 per thousand (the amount of the floor tax). The partial rejection was due to the fact that the floor tax was not paid by stamp, and consequently did not come within the provisions of the drawback statute.

18 After the claim for drawback had been rejected in so far as it concerned the floor tax, you called the atention of this office to the provisions of section 1310(c) of the revenue act of 1918, as authorizing the refund of the floor tax, with the request that the claim be reopened. This office declined to reopen the taxpayer's claim, but expressed its willingness to give consideration to any arguments you might care to make in support of your contention.

After careful consideration of your arguments, both oral and written, this office has, upon the advice of the Solicitor of Internal Revenue, reached the conclusion that section 1310(c) of the revenue act of 1918 can not be given the effect for which you contend.

In your briefs you have laid stress upon the immunity from taxation provided by the Constitution for articles exported, arguing that the enactment of the drawback statute was a recognition by Congress of its inability to lay a tax upon tobacco manufactured for export, and that consequently the drawback statute is not an exemption from taxation, and, as such, to be strictly construed. But this argument ignores the doctrine laid down in Cornell *v.* Coyne, 192 U. S. 418, 427, that "subjecting" an article "manufactured for the purpose of export to the same tax as all other" articles of the same kind "is casting no tax duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export."

Section 1310(c) of the revenue act of 1918 provides:

"Under such rules and regulations as the Commissioner with the approval of the Secretary may prescribe, the taxes imposed under the provisions of Titles VI, VII, or IX shall not apply in respect to articles sold or leased for export and in due course so exported. Under such rules and regulations the amount of any internal-revenue

tax erroneously or illegally collected in respect to exported articles may be refunded to the exporter of the article, instead of to the manufacturer, if the manufacturer waives any claim for the amount so to be refunded."

You state that, granting for the sake of argument that the department is correct in holding that the floor tax is not subject to drawback under the provisions of section 3386, R. S., this provision of law furnishes the only reason for the reference to the taxes under Title VII contained in section 1310(c). You state that, the drawback of stamp taxes having been already provided for by section 3386, R. S., upon exportation of the tobacco, snuff, cigars, or cigarettes, the inclusion of Title VII in the provisions of section 1310(c) is superfluous unless that section be taken to authorize the refund of the floor tax.

Two answers may be made to this argument: First, that section 1310(c) of the revenue act of 1918 is reenacted verbatim as section 1305 of the revenue act of 1921, though no floor tax is imposed by the later act, and second, that tobacco, snuff, cigars, and cigarettes are not the only articles upon which taxes are imposed by Title VII of the revenue act of 1918. Section 703, which is part of Title VII of the revenue act of 1918, imposes a tax "upon cigarette paper made up into packages, books, sets, or tubes." The tax upon this cigarette paper is not paid by stamp, nor is any provision made for a drawback of the tax previously paid upon exportation of the
19 cigarette paper. The tax is imposed upon the sale of cigarette papers in specified quantities by a manufacturer or importer to any person other than a manufacturer of cigarettes. If it were not for section 1310(c) cigarette papers sold to a foreign customer and shipped to him abroad would, under the doctrine announced in Cornell *v.* Coyne, supra, be subject to an internal-revenue tax upon their removal from the factory. The effect of section 1310(c) is to prevent the imposition of tax in such cases and to provide for a refund of the tax where the same has been erroneously or illegally collected. Such a construction of the section is reasonable and allows to it a proper effect.

It should further be noted that section 1310 (c) is not a drawback statute; it does not provide for the refundment of taxes which have once legally attached. It provides that certain taxes "shall not apply in respect to articles sold or leased for export and in due course so exported." Inasmuch as the cigarettes in question were on February 25, 1919, held by the taxpayer and intended for sale, their liability to the floor tax was on that date instantly and irrevocably fixed, and on future change of circumstances could affect the original application of the tax.

This office feels constrained to refuse to reopen the taxpayer's claim.

Respectfully,

(Sgd.) D. H. Blair,
Commissioner.

No part of the tax of 95 cents per thousand involved in this suit has been refunded or repaid to petitioner by the United States.

Conclusion of law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $145,397.50.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of one hundred and forty-five thousand three hundred and ninety-seven dollars and fifty cents ($145,397.50).

Opinion.

CAMPBELL, Chief Justice, delivered the opinion of the court:

The suit is for a drawback alleged to be authorized by section 3386, Revised Statutes.

The plaintiff, the manufacturer of the cigarettes, had paid the tax required by section 3394, Revised Statutes, which was $1.25 per thousand, and also the additional tax of 80 cents per thousand required by the revenue act of October 3, 1917. The Commissioner held that the amount of these two items should be refunded when the cigarettes had been exported, but he declined to allow a drawback of the tax required by section 702 of the revenue act of 1918 (40 Stat. 1118), which the plaintiff had also paid. As set forth in the findings, the Commissioner's action was stated by him as follows: The partial rejection was due to the fact that the floor tax was not paid by stamp and consequently did not come within the provisions of the drawback statute."

The act of 1918, in section 700 thereof, levied a tax on cigarettes, of a stated weight, of three dollars per thousand. This was an increase in the taxable rate of 95 cents per thousand. The act became effective February 25, 1919, and in terms applied to cigarettes sold by the manufacturer or removed for consumption or sale after that date. But articles mentioned in section 700, which had been manufactured and removed prior to the effective date of the act, were not required by section 700 to pay the additional tax. It hence followed that if this section were alone to govern there would be an inequality of tax on goods manufactured and held for sale immediately prior to the act and those manufactured and held for sale immediately after the act, which would place an undue burden on the latter kind. Section 702, however, takes care of this situation and imposes a like tax on the articles manufactured and held for sale "on or prior to the date" of the passage of the act. Calling it a "floor tax" does not alter its purpose, which was that of an equalizing tax. The tax is accordingly imposed upon the articles mentioned which had been removed from factory or custom house before the date of the passage of the act "upon which the tax imposed by

existing law" had been paid, and which on the day after the passage of the act were held and intended for sale. The same kinds of articles were thus made to pay the same tax. We do not think the Congress intended by designating the tax a "floor tax" to defeat a right of drawback when claimed by one who had removed his goods prior to the act and allow the drawback to one who produced his goods immediately after the act, both having paid exactly the same amount of taxes on identically the same kind of goods, and both having exported their goods. Broadly speaking, the intent of section 3386, as amended by the act of March 1, 1879, was to authorize the return to the manufacturer and exporter of goods upon their exportation of the amounts of specific taxes which had been paid upon them. It authorizes a drawback "equal in amount to the value of the stamps" affixed. The stamps affixed were those required when the tax of $1.25 per thousand was imposed. No additional stamps were affixed when the additional tax of eighty cents per thousand was imposed, because it was the custom and practice of the department to value the first stamps as inclusive of those contemplated by the act imposing the additional tax. We see no reason why the value of the stamps first affixed may not under the custom and practice mentioned be determined by the total of the three taxes paid, unless the view that the floor tax was paid in cash, and was therefore not within the drawback statute, can be maintained. As already said, in our opinion the payment of the tax, whether in the one form or the other comes within the spirit and intent of the statute authorizing the drawback when the goods upon which the tax has been paid are exported. The Treasury officials readily conceded the right of drawback as to two of the taxes, notwithstanding the goods had been taken from the factory and held for sale. They apparently recognize that the fact of export is sufficient to secure the right of drawback, so far as those items are concerned. We think the "floor tax" does not differ from the others when the amount of drawback is to be determined.

There was no necessity for "protest" under the facts of this case.
Plaintiff's goods came within the provision of the statute im-
21 posing the floor tax, and the tax was paid. Thereafter the goods were exported. If they had not been exported, there would be no drawback. Its cause of action arose, not when it paid the tax, but when it exported the goods and the drawback was refused. We do not allow interest because, in our opinion, the claim does not come within the provisions of section 1324 of the revenue act of 1921, 42 Stat. 316.

Our conclusion is that the plaintiff is entitled to recover the taxes paid, and judgment will be entered accordingly. And it is so ordered.

GRAHAM, Judge; HAY, Judge; DOWNEY, Judge, and BOOTH, Judge, concur.

22 V. *Judgment of the court.*

At a Court of Claims held in the city of Washington on the twenty-ninth day of October, A. D. 1923, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do order, adjudge, and decree that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of one hundred and forty-five thousand three hundred and ninety-seven dollars and fifty cents ($145,397.50).

By the Court.

VI. *Defendant's application for appeal.*

Filed January 26, 1924.

From the judgment rendered in the above-entitled cause on the 29th day of October, 1923, in favor of the claimant, the defendants, by their Attorney General, on the 26th day of January, 1924, make application for, and give notice of, an appeal to the Supreme Court of the United States.

Robert H. Lovett,
Assistant Attorney General.

VII. *Order of court allowing defendant's application for appeal.*

Entered March 3, 1924.

It is ordered by the court that the defendant's application for appeal be and the same is allowed.

By the Court.

23 [Title omitted.]

I, F. C. Kleinschmidt, assistant clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court by Campbell, Ch. J.; of the judgment of the court; of the defendant's application for appeal; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this sixth day of March, A. D. 1924.

[seal.]

F. C. Kleinschmidt,
Assistant Clerk, Court of Claims.

(Indorsement on cover:) File No. 30,183. Court of Claims. Term No. 873. The United States, appellant, *vs.* P. Lorillard Company. Filed March 10th, 1924. File No. 30,183.

IN THE

Supreme Court of the United States

October Term, 1923

THE UNITED STATES OF AMERICA, *Appellant*
vs.
P. LORILLARD COMPANY, A CORPORATION, *Appellee*
No. [redacted]3

APPEAL FROM THE COURT OF CLAIMS OF THE UNITED STATES

M. C. ELLIOTT,
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FOREST HYDE,
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CONTENTS

PART I

PART II

Cases Cited

Other Authorities Cited

Other Citations

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1923

THE UNITED STATES OF AMERICA
Appellant
vs.
P. LORILLARD COMPANY, A CORPORATION
Appellee
No. 873.

APPEAL FROM THE COURT OF CLAIMS OF THE UNITED STATES

BRIEF OF APPELLEE

PART I

NATURE OF THE CASE.

This is an appeal by the United States from a judgment rendered against it by the Court of Claims of the United States (all members of the court concurring) for the sum of $143,397.50 in a suit brought by Appellee to

recover this sum paid as taxes on 153,050,000 cigarettes which were exported during the year 1919.

FACTS IN THE CASE.

The appellee, a corporation, for many years has been engaged in the manufacture of cigarettes and other tobacco products for export as well as for domestic consumption. Beginning in August, 1919, it sold and exported during that year 153,050,000 cigarettes manufactured by it and known by the trade name or brand of "NEBO" upon which taxes were paid to the United States in the following amounts:

(a) As required by Section 3394 U. S. Revised Statutes, a tax of $1.25 per thousand;
(b) As required by Section 400 of the Revenue Act of 1917, an additional $0.80 per thousand;
(c) As required by Section 702 of the Revenue Act of 1918, an additional $0.95 per thousand;

making a total tax of $3.00 per thousand.(1)

For convenient reference each of the foregoing statutes is printed in the appendix to this brief.(2)

Following the exportation of these cigarettes appellee filed with the Commissioner of Internal Revenue claims for refund or drawback of these taxes under authority of Section 3386 U. S. Revised Statutes which is also printed in the appendix. (3)

The Commissioner refunded the tax of $1.25 per thousand paid as required by Section 3394 U. S. Revised Statutes (*supra*), and the tax of $0.80 per thousand paid as required

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(1) Record, page 3.
(2) Appendix, pages 58, 59, & 60.
(3) Appendix, page 57.

by Section 400 of the Revenue Act of 1917 (*supra*) making a total refund of $2.05 per thousand(4) but declined to refund the sum of $0.95 per thousand paid as required by Section 702 of the Revenue Act of 1918. Suit was accordingly instituted in the Court of Claims for the recovery of this tax and judgment was rendered against the United States for the amount paid.

THE ISSUES INVOLVED.

In defending suit for refund of the tax of $0.95 per thousand referred to in Section 702 as a "floor tax," the appellant attempted to draw a distinction between this tax and other taxes imposed on cigarettes. This so-called "floor tax" was treated as some new form of taxation differing in character from all other forms of taxation on cigarettes and tobacco products.

THE TAX IMPOSED BY SECTION 702 OF THE REVENUE ACT OF 1918.

Section 702 of the Revenue Act of 1918 reads as follows:

> "Section 702. That upon all the articles enumerated in Section 700, or 701, which were manufactured or imported, and removed from factory or custom house on or prior to the date of the passage of this Act, and upon which the tax imposed by existing law has been paid, and which are, on the day after the passage of this Act, held by any person and intended for sale, there shall be levied, assessed, collected and paid a floor tax equal to the difference between (a) the tax imposed by this Act upon such articles according to the class in which they are placed by this title, and (b) the tax imposed upon such articles by existing law other than Section 403 of the Revenue Act of 1917."(5)

When we turn to Section 700(6) we find that this section

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(4) **Record, pages 8 & 9.**
(5) **40 S. L. 1118.**
(6) **40 S. L. 1116, appendix, page 58.**

imposes a tax of $3.00 per thousand on cigarettes *"manufactured in or imported into the United States and hereafter sold by the manufacturer or importer or removed for consumption or sale."*

We also find that this tax of $3.00 per thousand on cigarettes is *"in lieu of the internal revenue taxes now imposed thereon by law."* (Italics ours.) Obviously then Section 700 repeals all other statutes in force at the time of the passage of the Revenue Act of 1918, which imposed taxes on cigarettes.

The language of Section 700 is free from ambiguity. Cigarettes sold by the manufacturer or importer or removed for consumption or sale after the passage of the Revenue Act of 1918, are subject to a tax of $3.00 per thousand and to no other tax.

What then is the purpose of Section 702 when considered in its true relation to Section 700? What tax is imposed by Section 702 and upon what articles?

The amount of the tax imposed by Section 702 on cigarettes is the difference between (a) the tax imposed by Section 700 and (b) the tax imposed by the revenue laws in force at the time of the passage of the Revenue Act of 1918.

As we have seen, Section 700 imposes a tax of $3.00 per thousand on cigarettes removed from the factory after the passage of the Revenue Act of 1918. Pre-existing revenue laws imposing taxes on cigarettes before their removal from the factory were Section 3394 U. S. Revised Statutes, which imposed a tax of $1.25 per thousand, and Section 400 of the Revenue Act of 1917, which imposed an additional tax of $0.80 per thousand, making a total of $2.05 per thousand. The amount of the tax imposed by Section 702, therefore, is the difference between the $3.00 per thousand imposed by Section 700 and the $2.05 per thousand imposed by pre-existing laws, or $0.95 per thousand. This tax of

$0.95 per thousand is the tax which was treated as separate and distinct from the tax of $3.00 per thousand imposed by Section 700 and as not refundable when the cigarettes upon which it had been paid were exported.

The effect of the Commissioner's ruling may best be illustrated by a concrete example: If, on February 24, 1919, a manufacturer had in his factory cigarettes upon which he had paid taxes aggregating $2.05 per thousand as required by pre-existing revenue laws before removing such cigarettes from the factory, under Section 700 of the Revenue Act of 1918 he would have been required to pay an additional $0.95 per thousand. Upon the subsequent exportation of such cigarettes, even though removed from the factory for domestic consumption or sale, the manufacturer would be entitled to a refund of the full $3.00 per thousand paid as taxes. On the other hand, another manufacturer after paying $3.00 per thousand in taxes would be entitled to a refund of only $2.05 per thousand if he removed the cigarettes from his factory on February 24, 1919, and held them for sale on February 25, 1919, the day following.

THE COURT OF CLAIMS HOLDS THAT SECTION 702 IMPOSES MERELY AN "EQUALIZING TAX" AND NOT A SEPARATE AND ADDITIONAL TAX.

The Court of Claims, in dealing with this question, speaking through the Chief Justice, said:

> "The plaintiff, the manufacturer of the cigarettes, had paid the tax required by Section 3394, Revised Statutes, which was $1.25 per thousand, and also the additional tax of 80 cents per thousand required by the Revenue Act of October 3, 1917. The Commissioner held that the amount of these two items should be refunded when the cigarettes had been exported, but he declined to allow a drawback of the tax required by Section 702 of the Revenue Act of 1918 (40 Stat. 1118) which the plaintiff had also paid. As

set forth in the findings, the Commissioner's action was stated by him as follows: The partial rejection was due to the fact that the floor tax was not paid by stamp and consequently did not come within the provisions of the drawback statute.

"The Act of 1918, in Section 700 thereof, levied a tax on cigarettes, of a stated weight, of three dollars per thousand. This was an increase in the taxable rate of 95 cents per thousand. The act became effective February 25, 1919, and in terms applied to cigarettes sold by the manufacturer or removed for consumption or sale after that date. But articles mentioned in Section 700, which had been manufactured and removed prior to the effective date of the Act, were not required by Section 700 to pay the additional tax. *It hence followed that if this section were alone to govern there would be an inequality of tax on goods manufactured and held for sale immediately prior to the act and those manufactured and held for sale immediately after the act, which would place an undue burden on the latter kind.* Section 702, however, takes care of this situation and imposes a like tax on the articles manufactured and held for sale 'on or prior to the date' of the passage of the act. *Calling it a 'floor tax' does not alter its purpose, which was that of an equalizing tax.* The tax is accordingly imposed upon the articles mentioned which had been removed from the factory or custom house before the date of the passage of the act 'upon which the tax imposed by existing law' had been paid, and which on the day after the passage of the act were held and intended for sale. The same kinds of articles were thus made to pay the same tax. We do not think the Congress intended by designating the tax a 'floor tax' *to defeat a right of drawback when claimed by one who had removed his goods prior to the act and allow the drawback to one who produced his goods immediately after the act, both having paid exactly the same amount of taxes on identically the same kind of goods, and both having exported their goods.* Broadly speaking, the

intent of Section 3386, as amended by the act of March 1, 1879, was to authorize the return to the manufacturer and exporter of goods upon their exportation of the amounts of specific taxes which had been paid upon them. It authorizes a drawback 'equal in amount to the value of the stamps' affixed. The stamps affixed were those required when the tax of $1.25 per thousand was imposed. *No additional stamps were affixed when the additional tax of eighty cents per thousand was imposed, because it was the custom and practice of the department to value the first stamps as inclusive of those contemplated by the act imposing the additional tax.* We see no reason why the value of the stamps first affixed may not under the custom and practice mentioned be determined by the total of the three taxes paid, unless the view that the floor tax was paid in cash, and was therefore not within the drawback statute, can be maintained. As already said, in our opinion the payment of the tax whether in the one form or the other comes within the spirit and intent of the statute authorizing the drawback when the goods upon which the tax has been paid are exported. *The Treasury officials readily conceded the right of drawback as to two of the taxes, notwithstanding the goods had been taken from the factory and held for sale. They apparently recognize that the fact of export is sufficient to secure the right of drawback, so far as those items are concerned. We think the 'floor tax' does not differ from the others when the amount of drawback is to be determined.* (Italics ours.)

This reasoning of the Court to us seems unanswerable and to require no elaboration and no argument to support it. The question involved is one of statutory construction and the intent of Congress seems clear.

APPELLANT'S CONTENTION.

Counsel for appellant were, however, unwilling to accept this interpretation and insist that Section 702 imposes

some new form of unrefundable excise tax. Their contention is summarized in their brief as follows:

> "(a) The 'floor tax' imposed by Section 702 is not the same as the stamp tax imposed by Section 700 or 701 but is a separate and additional tax which attaches to articles 'held by any person and intended for sale' on the effective date of the act.
>
> "(b) Section 3386 Revised Statutes does not authorize the refund or drawback of the floor tax imposed by Section 702 of the revenue act of 1918."

This second proposition or conclusion of law is necessarily dependent upon the first. If the tax imposed by Section 702 is the same tax or is a part of the same tax that is imposed by Section 700 it follows that it is refundable under Section 3386 Revised Statutes since it is conceded that the tax imposed by Section 700 is refundable. To express the same thought in a different manner, if the Court of Claims is correct in holding that this is merely an "equalizing tax" designed to subject cigarettes removed from the factory on or before February 24, 1919, to the same tax as those removed after this date and it is conceded (as it has been) that a part of this tax is refundable, it must be conceded that the whole is refundable.

In this view it would be naturally assumed that appellant's counsel contend that the Court of Claims erred in holding that this is merely an *equalizing* tax and not a separate and additional tax.

When we turn to appellant's brief, however, we find that the tax imposed by Section 702 is described by counsel as an "equalizing and war emergency tax." The contention is nevertheless made that it is an additional and unrefundable tax.

NOT AN ADDITIONAL NOR A WAR EMERGENCY TAX.

The definition of this tax as an "equalizing tax" is clearly justified but with all deference we fail to understand upon what theory it is designated by counsel as a war emergency tax. Section 700 which increases the tax on cigarettes from $2.05 to $3.00 per thousand conceivably might be called a war emergency tax on the theory that it became necessary as a result of the war to increase the revenues of the Government. But even this increase was not limited to any specific duration. The act was passed after the signing of the Armistice and is still in force.

Section 702, on the other hand, does not increase the tax on cigarettes from $3.00 to $3.95 nor to any other amount. It does not apply to cigarettes "held and intended for sale" during the war period or during any period following the war. It applied only to those cigarettes withdrawn from the factory on or before February 24, 1919, which were held and intended for sale on the day following and its purpose was manifestly to make applicable to such cigarettes the $3.00 tax imposed by Section 700.

AUTHORITIES CITED BY APPELLANT.

While we shall endeavor in Part II of this brief to reply in detail to the arguments made by appellant's counsel in support of their contention that this is an additional and unrefundable tax, we desire at this point to direct the Court's attention to the facts

(a) that no attempt is made by counsel for the appellant to discuss the reasoning of the Court of Claims as to the purpose and intent of Section 702;

(b) that no rules of statutory construction are invoked; and

(c) that as stated the conclusion of the Court that this is merely an "equalizing tax" is apparently accepted by the appellant.

We also direct attention to the fact that in our view the cases relied upon by the appellant to support its contention cannot be said to apply to the question under consideration.

NO CONSTITUTIONAL QUESTION INVOLVED.

The cases relied upon to support the contention of the appellant's counsel that this is a new form of unrefundable tax are Cornell v. Coyne (192 U. S. 418) and Patton v. Brady (184 U. S. 608).

Cornell v. Coyne.

This case merely holds that Congress is not prohibited by Article I, Section 9, clause 5 of the Constitution from imposing taxes on articles which may be subsequently exported. This question is not involved and was not an issue in the case before the Court of Claims. On the contrary, it was made clear to the Court that this case does not rest upon the constitutionality of Section 702 of the Revenue Act of 1918, but rather upon its proper interpretation; and we reiterate that it is not necessary in this case to consider the constitutionality of Section 702 or of any of the statutes involved in this suit.

The quotation from the lectures of Mr. Justice Miller on the Constitution embodied in the decision in this case likewise deals with the subject of constitutionality of statutes of this sort and has no bearing upon the interpretation of the act involved.

Patton v. Brady.

This case merely holds that an additional excise tax may be levied against an article which has been already

subjected to such a tax. As we have stated the question here involved is not whether Congress *may* levy an additional excise tax but whether Section 702 has imposed such an additional tax.

While these cases are quoted from *in extenso* they constitute apparently the only authority relied upon by appellant's counsel to support their conclusion of law that this is an additional and unrefundable tax. We submit that neither of these cases can be said to remotely bear upon the issue under consideration.

NO PROTEST NECESSARY.

It is also contended by appellant that appellee is not entitled to recover because the floor tax was not paid under protest. Considerable space is devoted to argument on this point and numerous cases are cited which will be discussed in detail in Part III of this brief. This question was disposed of by the Court of Claims in the following language:

> "There was no necessity for protest under the facts of this case. Plaintiff's goods came within the provision of the statute imposing the floor tax and the tax was paid. Thereafter the goods were exported. If they had not been exported there would be no drawback. Its cause of action arose not when it paid the tax but when it exported the goods and the drawback was refused." (Record p. 18.)

While we feel that this language of the court needs no elaboration we shall endeavor to show in Part III of this brief that the cases relied upon by the appellant have no application to the facts of this case and that while we contend that no protest was necessary, as a matter of fact the record shows (record, p. 4, 6 and 8) that payment was made under protest and, indeed, under duress.

We have thus far endeavored to give a brief summary of the arguments presented by counsel for appellant and to call attention to the fact that no real attempt has been made to show in what particular the Court of Claims erred. The arguments now presented are merely a reiteration with some few omissions of those presented by the appellant to the lower court. In Parts II and III of this brief we have, therefore, made substantially the same reply to these arguments that we made when the case was heard by the Court of Claims and have endeavored to show that the application of any reasonable rule of statutory construction inevitably leads to the conclusion reached by that court.

PART TWO

ANSWER TO ARGUMENT OF COUNSEL FOR APPELLANT IN SUPPORT OF PROPOSITION THAT SECTION 702 IMPOSES AN ADDITIONAL AND UNREFUNDABLE TAX.

In its statement of the facts in this case, after showing that the Commissioner had refunded $2.05 of the $3.00 per thousand paid by the Appellee as taxes but had refused to refund the balance of 95 cents per thousand the court says:

> "As set forth in the findings the Commissioner's action was stated by him as follows:
>
> 'The partial rejection was due to the fact that the floor-tax was not paid by stamps and consequently did not come within the provisions of the drawback statute.' "

In support of this contention Counsel for the Appellant contend that this is an additional tax:

> (a) Because while the articles taxed under Section 702 are the same as the articles taxed under Section 700 the status of such articles differs.

(b) That the persons who may be called upon to pay the tax imposed by Section 702 are not necessarily the same as those required to pay the tax under Section 700.

(c) That Congress has designated the tax imposed by Section 702 a "floor tax."

(d) That the tax imposed by Section 702 is "assessed" and is not collected by stamps.

We shall endeavor to answer each of these arguments in detail but to prevent as far as possible needless repetition these points will be considered in the discussion which follows wherein our effort will be to show that when we apply any of the accepted rules of statutory construction we inevitably reach the result reached by the Court of Claims that this is merely an equalizing tax.

We submit:

(1) That considering merely the language of Section 702 and the context it is clear that Congress did not intend by this section to impose a new or additional and unrefundable tax, but intended merely to prevent the evasion of the tax imposed by Section 700 by withdrawal of cigarettes from the factory in anticipation of the passage of the Act.

(2) That considering the legislative policy of Congress as indicating its intent, it appears that the invariable policy of Congress has been not to tax cigarettes intended for export or which are exported and to refund taxes paid on cigarettes removed for domestic consumption when exported.

(3) That considering the circumstances under which Section 702 was passed, it is apparent that this section does not impose a new form of taxation but is merely a re-enactment with slight modification of Section 403 of the Revenue Act of 1917(7) and bears the same relation to Section 700 of the 1918 Revenue Act as Section 403 bears to Section 400 of the Revenue Act

(7) 40 S. L. 313, *infra*, p. 34.

of 1917. That both sections were intended as a substitute for the so-called padlock legislation used in European countries and were designed merely to prevent the manufacturer from escaping the payment in full of taxes imposed by these acts by withdrawal of cigarettes from the factory in anticipation of their passage. That no special significance should be attached to the use of the language "floor tax" used in the Revenue Act of 1918.

Section 702 Not a New Form of Taxation.

Section 702 is one of many sections of the Revenue Act of 1918. It is an integral part of the system designed by Congress for raising revenues for the Government. It is not only necessary to so consider it under the accepted rules of statutory construction but it so happens that this particular section by reference makes a part of it every other statute imposing taxes on cigarettes which was in force at the time of its passage. It refers in terms to Section 700 which imposes a tax of $3.00 per thousand on cigarettes manufactured or imported into the United States, and in determining the amount of tax imposed by Section 702 it is necessary to deduct from the tax imposed by Section 700 the aggregate taxes imposed by all other pre-existing statutes. Section 702, therefore, is not an isolated nor an independent statute and can be interpreted only by considering it in its true relation to then existing revenue laws.

The Commissioner insisted that it imposes an additional tax; in other words, that Congress intended this as a means of raising additional revenue from the taxation of cigarettes. As we have seen, however, Section 700 of the Revenue Act of 1918 imposes a tax of $3.00 per thousand on cigarettes which is in lieu of the internal revenue taxes then imposed thereon by law. It, therefore,

supersedes all pre-existing statutes taxing cigarettes. Section 702 being a part of the same act becomes effective on the same date. It is not and cannot be contended that Section 702 imposes a tax of 95 cents per thousand on cigarettes *in addition* to the tax of $3.00 imposed by Section 700.

The use of the word "additional" (8) is, therefore, somewhat misleading. Obviously, the Commissioner in using the word "additional" meant that this tax applies to cigarettes upon which taxes had been paid under pre-existing laws and to that extent it constituted an additional tax.

The same reasoning applies with equal force to Section 700; that is to say, if as in the instant case, the taxpayer had paid $2.05 per thousand on cigarettes prior to the passage of the Revenue Act of 1918, under Section 700 he would have been required to pay an additional 95 cents per thousand before removal of the cigarettes from the factory. Treating it then as an additional tax this 95 cents per thousand must be paid by the manufacturer whether the cigarettes are removed before or after January 24, 1919. This being true, the tax to all intents and purposes is the same tax whether paid under Section 700 or under Section 702. The more reasonable construction of Section 702, therefore, is not that it imposes a new and independent tax but that it merely provides a means for making applicable and for collecting the tax imposed by Section 700 on cigarettes removed from the factory in anticipation of the passage of the Act. As the Court of Claims has so well defined it, it is an "equalizing tax."

It will be observed that Section 702 is limited to cigarettes which on the day after the passage of the Revenue Act

(8) **Record, page 7.**

of 1918 are held by any person and intended for sale. If Congress had intended to provide some new form of excise tax in the form of a "floor tax" on cigarettes held and intended for sale by any person it would not have incorporated this limitation. In other words, if this tax of 95 cents per thousand had been intended to raise revenue in addition to that raised by Section 700 it would have been made applicable to cigarettes withdrawn from the factory at any time and held by any person and intended for sale. In such case Congress would have imposed a straight tax of 95 cents on all such cigarettes and would not have made this amount of the tax the difference between the tax imposed by Section 700 and the tax imposed by pre-existing laws.

When we later come to consider the circumstances under which this act was passed, we shall show that the language "floor tax" was not intended by Congress to have any special significance or to denote any new form of taxation and that the importance attributed by the Appellant to the use of this language is not justified.

The Word "Assessed" Not Used in a Technical Sense by Congress.

As further evidence that Section 702 was intended to impose some new and independent form of tax the Commissioner laid special stress upon the fact that this tax is "assessed" and not collected by stamps (9). It is true that Section 700 in imposing a tax of $3.00 per thousand provides that "it shall be levied, collected and paid under the provisions of existing law" while Section 702 provides that the tax imposed "shall be levied, assessed, collected and paid." When we refer, however, to other statutes imposing taxes on cigarettes we find the words "levied" and "assessed" are used more or less interchangeably and not

(9) **Record, page 10.**

in any such technical sense as will justify the position of the Commissioner in distinguishing these two statutes on this ground.

There is no reason to assume that a tax assessed cannot be collected by stamps; on the contrary we find that Congress has not only made provision for the collection by the sale of suitable stamps of taxes "assessed" but in some instances has given the Commissioner the authority to assess and collect in cash so-called stamp taxes.

To illustrate: Section 3394 U. S. Revised Statutes imposing a tax of $1.25 per thousand on cigarettes (which statute was in existence until the passage of the Revenue Act of 1918) provides in part that "upon cigars and cigarettes which have been manufactured and sold or removed for consumption and sale there shall be *assessed* and collected the following taxes to be paid by the manufacturer thereof" (italics ours). A later provision of Section 3394 provides for the collection of this tax by the sale of suitable stamps. (10)

Section 400 of the Revenue Act of 1917 in imposing taxes on cigarettes uses the language that such taxes shall be "levied and collected". A later provision of this section provides for the collection of this tax by the sale of suitable stamps.

Section 700 of the Revenue Act of 1918, in imposing taxes on cigarettes, uses the language "shall be levied, collected and paid", while Section 702 uses the language "shall be levied, assessed, collected and paid."

Section 403 of the Revenue Act of 1917 (which occupies the same relation to that act as Section 702 occupies to the Revenue Act of 1918) uses the words "levied and collected."

It is apparent, therefore, that no special significance

(10) **Appendix, page 58.**

should be attached to the use of the language employed by Congress in imposing taxes on cigarettes. As stated it is not unusual for Congress to require taxes "assessed" to be collected by stamps. The instant case furnishes a concrete illustration of the fact that the language "assessed" is not used in any technical sense. In this case the tax of $1.25 per thousand "assessed" under Section 3394, Revised Statutes, was collected by *the sale of* suitable stamps. The tax of 80 cents per thousand imposed by the Act of 1917 was technically a stamp tax in that the statute authorized collection by the sale of suitable stamps, but in this case the Commissioner was given the authority (which he exercised) to collect this tax in cash and not by the sale of stamps.

Section 1006 of the Revenue Act of 1917 provides:

> "That where the rate of tax imposed by this act payable by stamps is an increase over previously existing rates, stamps on hand in the collectors' offices and in the bureau of internal revenue may be sold and accounted for at the rates provided by this act and *assessment* shall be made against the manufacturers and other taxpayers having such stamps on hand on the day this act takes effect for the difference between the amount paid for such stamps and the tax due at the rates provided by this act" (italics ours)(11).

In view of this section the Commissioner did not require Appellee to purchase additional stamps and to attach such stamps to the packages containing the cigarettes, but merely required the payment in cash of 80 cents per thousand on cigarettes on hand which had not been withdrawn from the factory and thereafter treated the value of the stamps already attached as increased from $1.25 to $2.05 per thousand. It is clear, therefore, that the mere fact that

(11) 40 S. L. 326.

Congress uses the word "assessed" in imposing a tax does not mean that such tax cannot be collected by suitable stamps.

Section 1311 of the Act of 1918 ([12]) is a re-enactment of Section 1006 of the Revenue Act of 1917. It is clear, therefore, that the Commissioner in collecting the tax imposed by Section 700 (which is an increase of 95 cents per thousand over pre-existing taxes on cigarettes) may follow the same course that he followed in collecting the tax of 80 cents per thousand imposed by the Revenue Act of 1917; that is to say, he may collect this stamp tax of 95 cents per thousand in cash by assessment against the manufacturer instead of requiring the purchase of additional stamps to be affixed to the packages containing the cigarettes, in which event the collection of the tax under Section 700 will be made in the same manner as the collection of the tax under Section 702.

Under these circumstances the contention that the use of the word "assessed" in Section 702 distinguishes the tax imposed by that section from the tax imposed by Section 700 seems hardly justified.

Difference in Time of Payment

As a further reason for treating this as an unrefundable tax counsel for Appellant argue that it applies to tax-paid cigarettes after their removal from the factory. As we have already seen, Section 700 likewise applies to tax-paid cigarettes, since manufacturers who had already paid $2.05 per thousand are required to pay the additional 95 cents per thousand before the removal of the cigarettes from the factory; and the obvious purpose of Section 702, as pointed out by the court, was to equalize the tax by requiring those

(12) 40 S. L. 1144.

who had removed cigarettes from the factory in anticipation of the passage of the act to pay the same tax as those removing them after its passage. The fact that others as well as manufacturers who held for sale cigarettes which were removed from the factory prior to February 25, 1919, are required to pay this tax of 95 cents per thousand hardly justifies the treatment of this tax as a new form of unrefundable tax.

The contention that the tax under Section 702 differs from that under Section 700 both in respect to persons who must pay the same and the status of the articles with reference to which it is imposed, is not quite complete. Section 700 imposes a tax on cigarettes sold or removed for consumption or sale. Section 702 imposes a tax on cigarettes removed prior to a specified date which are held and intended for sale. The article taxed is the same in both cases. The only difference in the status of the article is that under Section 700 the tax is collected before removal while under Section 702 it is collected after removal.

Persons Paying the Tax

The persons paying the tax may be but are not necessarily different persons. The manufacturer removing cigarettes from the factory before February 25, 1919, is required by Section 702 to pay this tax of 95 cents per thousand after removal. The manufacturer removing cigarettes from the factory after February 24, 1919, is required to pay the same amount before removal. Persons other than manufacturers holding cigarettes for sale which were removed from the factory prior to February 25, 1919, are likewise required to pay this tax of 95 cents per thousand and persons other than manufacturers owning cigarettes which have not been removed from the factory on February 25, 1919, would be required to pay this additioinal 95 cents before removal.

The tax imposed by Section 702 is not, therefore, a tax imposed upon a class other than manufacturers but applies to any person, including manufacturers, who on February 25, 1919, held cigarettes for sale which were removed prior to that date.

In the instant case the cigarettes after removal were held by the manufacturer and the tax was collected from the manufacturer. It is difficult to understand, therefore, through what process of reasoning this so-called distinction as between the articles taxed and the persons paying the tax can be said to justify the assumption that Congress intended by Section 702 to create a new form of unrefundable tax.

Thus far we have endeavored to consider the language used by Congress without invoking those rules of statutory construction that may be resorted to in order to clarify any ambiguity in a statute.

LEGISLATIVE POLICY

It is an accepted rule of statutory construction that "legislative policy clearly deducible from the consistent legislation of Congress is a legitimate factor in determining the meaning of subsequent acts open to construction" (26). The courts have consistently held that "for the purpose of determining the meaning although not the validity of a statute recourse may be had to considerations of public policy and to the established policy of the legislature as disclosed by a general course of legislation" (27).

A review of the Acts of Congress imposing taxes on cigarettes will show that it has been the consistent policy of Congress

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(26) Vol. 1, Fed. Stat. Ann. 2d Ed., p. 75 and cases cited.
(27) 36 Cyc. 1111, and cases cited.

(a) to tax only those cigarettes which are manufactured and sold in the United States and not to tax cigarettes exported and sold abroad;

(b) to authorize the refund of taxes assessed and collected against cigarettes removed from the factory for sale in the United States upon proof of their subsequent exportation.

Section 3394 U. S. Revised Statutes (*supra*) was originally drawn from an act of July 20, 1868 (28) which imposed a tax "upon cigars which shall be manufactured and sold or removed for consumption or use." While this act has been amended from time to time the amount of tax being increased or decreased, the purpose and effect have remained the same, namely, to tax only cigarettes manufactured and sold or removed for consumption and use within the United States.

The Act of March 3, 1875 (29), increased the amount of the tax. The Act of July 24, 1897 (30), reduced the amount of the tax. The Act of August 5, 1909 (31), (which was expressly saved from repeal by the Underwood Tariff Act of October 3, 1913) (32) superseded the former acts but contained the same language with reference to the imposition of the tax; namely, that it shall be upon "cigarettes which shall be manufactured and sold or removed for consumption or sale."

Section 400 of the Revenue Act of 1917, which increased the amount of the tax, likewise contained this

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(28) 15 S. L. 160.
(29) 18 S. L. 339.
(30) 30 S. L. 206.
(31) 36 S. L. 110.
(32) 38 S. L. 301.

language. Section 700 of the Revenue Act of 1918 contained the same language with slight modification; that is to say, it imposed a tax "upon cigarettes manufactured in *or imported into* the United States and hereafter sold by the manufacturer or importer or removed for consumption or sale." (Italics ours.)

Section 702 of the Revenue Act of 1918, as we have seen, refers to Section 700 for the enumeration of articles taxed and the language just quoted must, therefore, be treated as part of the language of Section 702; that is to say, such tax as may be imposed by Section 702 on cigarettes is imposed on "cigarettes manufactured in or imported into the United States and hereafter sold by the manufacturer or importer or removed for consumption or sale."

Review of Statutes Authorizing Refund of Taxes on Cigarettes Exported After Their Removal From the Factory

Section 3386 U. S. Revised Statutes, provides in part that

> "There shall be an allowance of drawback on tobacco, snuff and cigars, on which the tax has been paid by suitable stamps, affixed thereto before removal from the place of manufacture, when the same are exported, equal in amount to the value of the stamps found to have been so affixed; * * *."

The obvious purpose of this provision was to provide for refund of taxes paid on the articles manufactured, before their removal from the factory upon the subsequent exportation of such articles. A brief review of the statutes dealing with this subject will show that various methods have been adopted by Congress to prevent the taxation of cigarettes intended for export and to insure the refund of taxes paid on cigarettes upon their subse-

quent exportation. In each case Congress has endeavored to adopt appropriate safeguards against the evasion of taxes on cigarettes manufactured and sold in the United States without departing from its established policy of not taxing nor attempting to tax cigarettes intended for export, or which are subsequently exported.

Under the Act of March 3, 1863 (33), manufactured tobacco was permitted to be removed from the place of manufacture for exportation after inspection by the government, upon and with the written permission of the collector, *without payment of tax previous to removal*, the owner being required to give bond that such tobacco would be exported within the time specified in the bond or to pay the tax.

By the Act of June 30, 1864 (34), the manufacturer was permitted to transfer manufactured tobacco, snuff, and cigars to a bonded warehouse established in conformity with law and Treasury regulations upon the execution of certain bonds or such other security as the Secretary of the Treasury might prescribe and to *withdraw for export such tobacco, snuff and cigars without payment of any tax* or for domestic consumption upon the payment of the required tax.

By the Act of June 20, 1868 (35), the Commissioner of Internal Revenue was authorized to establish export bonded warehouses at any port of entry in the United States for the storage of tobacco and snuff intended for export. Withdrawal was allowed upon the permit of the collector *for immediate exportation without the payment*

(33) 12 S. L. 730.
(34) 13 S. L. 263.
(35) 15 S. L. 157.

of any tax or for consumption and sale within the United States upon the payment of the required tax.

Under paragraph 74 (36) of this act manufacturers were permitted to withdraw from their factories tobacco and snuff without payment of tax where such articles were transported immediately to export bonded warehouses. Before removal from the factory all such articles were required to have affixed to each package an engraved stamp indicative of the manufacturers' intent to export them.

This method of identifying goods intended for export by requiring export stamps to be attached to the articles to be deposited in export bonded warehouses continued in force until 1872. The Act of June 6, 1872 (37), which was passed largely upon the recommendation of the Commissioner of Internal Revenue (38) did away with the use of bonded warehouses and permitted the removal of tobacco products from the factory in bond under regulations to be prescribed by the Commissioner of Internal Revenue who was authorized to require the manufacturer to give such security as he might prescribe. Under this plan, inasmuch as tobacco products intended for future export could no longer be placed in export bonded warehouses and unless such products withdrawn from the factory under bond or under security were immediately exported or exported within a reasonably short time, they became subject to the tax, it became necessary to provide for the refund of taxes paid on such products removed from the factory for domestic sale or consumption upon the subsequent exportation of such products.

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(36) 15 S. L. 157.
(37) 17 S. L. 254.
(38) Jones vs. Blackwell (1879) 100 U. S. 599.

The drawback system provided for by Section 3386 U. S. Revised Statutes was, therefore, for the first time introduced; that is to say, the Act of June 6, 1872 (39), contained a provision substantially similar to Section 3386 as it now stands and provided for "an allowance of drawback on tobacco, snuff and cigars on which the tax has been paid by suitable stamps affixed thereto before removal from the place of manufacture when the same are exported equal in amount to the value of the stamps found to have been so affixed." This section was slightly amended by the Act of March 1, 1879 (40), in that the evidence required that the goods had been actually exported was somewhat changed.

In all these statutes dealing with this subject, however, the policy of Congress has been uniform. Prior to the Act of June 6, 1872 (*supra*), upon submission of evidence that the tobacco products were intended for export they were exempted from taxation. Since 1872 upon proof of the exportation of such products taxes paid on such products before removal from the factory have been refunded. It can hardly be denied, therefore, that the policy of Congress consistently has been to tax only those cigarettes which are manufactured and sold in the United States and to authorize the refund of taxes paid on cigarettes before their removal from the factory when such cigarettes are exported and sold abroad.

TAX REFUNDABLE UNDER SECTION 3386 U. S. REVISED STATUTES.

With all due deference we submit that the contention of the Appellant that this tax is not refundable under Section 3386 is highly technical and is not consistent with the Com-

(39) 17 S. L. 254, Sec. 74.
(40) 20 S. L. 347.

missioner's treatment of the tax of eighty cents per thousand paid under the 1917 Revenue Act. In that instance the tax was "assessed" and collected in cash. No new stamps were purchased by the manufacturer and affixed to the packages containing the cigarettes but the eighty cents per thousand was treated as increasing the value of the stamps already affixed. (41) This action of the Commissioner was authorized by Section 1006 of the Revenue Act of 1917 and this section was re-enacted as Section 1311 of the Revenue Act of 1918. Both sections contain a provision to the effect that the Commissioner may make an assessment "against the manufacturers and other taxpayers having such stamps on hand on the day this act takes effect for the difference between the amount paid for such stamps and the tax due at the rates provided by this act".

If the taxpayer pays the difference between the original purchase price of the stamps and the new rate of taxation and the stamps originally purchased are used, clearly the value of the stamps used is increased by the amount thus paid; and this view was very properly adopted by the Commissioner when the payment of eighty cents per thousand was made as above indicated. This tax of eighty cents per thousand was refunded as part of the value of the stamps affixed under Section 3386 U. S. Revised Statutes. When the ninety-five cents per thousand was paid, however, by the same manufacturer after the removal of the cigarettes from the factory, the Commissioner held that this payment did not increase the value of the stamps.

In this connection attention is called to the fact that under the language used in the statutes referred to above, the assessment is to be made against the manufacturers "and other taxpayers having such stamps on hand on the day

(41) **Record, page 3.**

this act takes effect". As the tax imposed by Section 700 is payable by the manufacturer or importer, is it not reasonable to assume that the reference to "other taxpayers having such stamps on hand" was intended to include others than manufacturers who held cigarettes for sale on the effective date of the act? In other words, isn't this language broad enough to be interpreted as providing a specific means for the collection of this so-called "floor-tax"? If it is, then is there any escape from the conclusion that the payment of this tax does increase the value of the stamps originally affixed If this is conceded then clearly the manufacturer in this case is entitled to refund of the ninety-five cents per thousand under authority of Section 3386, U. S. Revised Statutes.

If Section 1311 of the Revenue Act of 1918 was not intended to provide among other things, a specific means for the collection of the floor tax imposed by Section 702, then clearly the Commissioner, under authority of Section 1307 (42) could, in his discretion, collect this tax by the sale of suitable stamps.

IF ANY DOUBT EXISTS AS TO RIGHT OF REFUND OR DRAWBACK UNDER SECTION 3386, REVISED STATUTES, THIS DOUBT IS REMOVED BY SECTION 1310 (c) OF THE REVENUE ACT OF 1918.

This brings us to the consideration of Section 1310 (c) of the Revenue Act of 1918, which reads as follows:

> "Under such rules and regulations as the Commissioner with the approval of the Secretary may prescribe, the tax imposed under the provisions of Titles VI, VII or IX shall not apply in respect to articles sold or leased for export and in due course so exported. Under such rules and regulations the amount of any internal-revenue tax erroneously or illegally collected

(42) 40 S. 'L. 1143 appendix pp. 59, 60.

> in respect to exported articles may be refunded to the exporter of the article, instead of to the manufacturer, if the manufacturer waives any claim for the amount so to be refunded." (43)

Section 702 is a part of Title VII of this Act. The tax imposed on cigarettes in the instant case, therefore, comes clearly within the language of the statute which provides *inter alia,* that "the taxes imposed under the provisions of Titles * * VII * * shall not apply in respect to articles sold or leased for export and in due course so exported."

As the record shows the cigarettes were in due course exported, it would seem to follow, therefore, as a matter of course, that the remainder of the statute necessarily applies. The language used is free from ambiguity. The statute provides in terms

> "Under such rules and regulations the amount of any internal revenue tax erroneously or illegally collected in respect to exported articles may be refunded to the exporter of the article instead of to the manufacturer if the manufacturer waives any claim to the amount so to be refunded."

The Commissioner insisted that appellee could not have the benefit of this section because the tax imposed by Section 702 became "instantly and irrevocably fixed" on February 25, 1919, and that "no future change of circumstances could affect the original application of the tax." (44)

It is thus obvious that the Commissioner's ruling is based upon a conclusion of law. There is no language used in Section 702 which justifies the assumption that the tax imposed by this section is instantly and *irrevocably* fixed. We have already shown that such an interpretation involves

(43) **40 S. L. 1144.**
(44) **Record, p. 16.**

the assumption that Congress intended to abandon its fixed policy of providing for the refund or drawback of taxes on cigarettes in all cases where such cigarettes are exported. It also involves a disregard of the clear and unambiguous language of Section 1310 (c) which authorizes the refund of taxes imposed by Title VII of the Revenue Act of 1918, when it appeared that such taxes had been applied to "articles sold or leased for export and in due course so exported."

Does this mean as contended by appellant's counsel that the articles referred to must have been sold or leased for export and in due course exported *on the date that the tax became effective?* This meaning cannot reasonably be given to this language, since if the articles referred to had been sold or leased for export and in due course exported on February 25, 1919 (the effective date of the act) they could not have been held and intended for sale on the day following; and unless they were held and intended for sale on the day following the effective date of the act, the tax imposed by Section 702 could not apply. To give any reasonable meaning to this language, therefore, we must assume that it applied to articles which at some time subsequent to February 24, 1919, were sold or leased for export and in due course exported.

The Commissioner took issue with this view on the ground that proper effect could be given to this language if it is construed to apply to Section 703(46) which imposes a tax on cigarette papers.(47) He pointed out that Section 703 (which is also a part of Title VII) imposes a tax on cigarette papers which is not collected by stamps and except for Section 1310 (c) cigarette papers sold to a foreign

(46) 40 S. L. 1118, App. p. 59.
(47) Record, page 16.

customer and shipped to him abroad would be subject to an internal revenue tax upon their removal from the factory. He, therefore, apparently concluded that Section 1310 (c) was intended to apply only to Section 703 and to authorize a refund only of the tax paid upon cigarette papers exported.

We submit that this explanation of the purpose of Section 1310 (c) is hardly convincing. If Congress intended merely to exempt from taxation cigarette papers "sold or leased for export and in due course so exported" why did it refer to taxes imposed by Title VII (which includes Sections 700, 701, 702, 703 and 704) instead of referring only to Section 703? If it intended merely to afford exemption to cigarette papers sold or leased for export and in due course so exported before the effective date of the act why was it necessary to provide for a special refund of this tax? Section 1316 of the Revenue Act of 1918(48) amending Section 3220 U. S. Revised Statutes, gives the Commissioner full authority to refund taxes "erroneously or illegally collected" and any tax imposed on articles "sold or leased for export and in due course so exported" before the effective date of the statute would unquestionably be a tax on exports within the meaning of that article of the Constitution which provides that "No tax or duty shall be laid on articles exported from any state."(49)

Can it be said then, that the purpose of Section 1310 (c) was to prohibit the imposition of an unconstitutional tax or to authorize the refund of taxes unconstitutionally imposed and that this was the sole purpose of this section? If it is conceded that Section 1310 (c) does not contemplate that articles exempted from tax must have been "sold or leased for export and in due course so exported" before the

(48) 40 S. L. 1145.
(49) Art. I, Sec. 9, cl. 5.

effective date of the Act, then it necessarily follows that this right of refund applies to articles "sold or leased for export and in due course so exported" after the effective date of the act.

If this is the true interpretation it must apply as well to Section 702 as to Section 703, in which case it must be conceded that the taxes imposed by Section 702 of Title VII may have become *"instantly"* but they did not become *"irrevocably"* fixed on February 25, 1919, the effective date of the Act, and this conclusion of law of the Commissioner(50) can not be sustained.

NO JUSTIFICATION FOR ASSUMPTION THAT "TAXES IMPOSED BY TITLE VII" MEANT TAXES IMPOSED BY ONE SECTION OF THAT TITLE.

It is hardly necessary to cite authority for the proposition that in construing statutes effect should be given to all their provisions. Quoting from Federal Statutes Annotated:

> " 'We are not at liberty,' said Mr. Justice Strong, 'to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment it was said that 'a statute ought upon the whole to be so construed that if it can be prevented no clause, sentence or word shall be superfluous, void or insignificant.' This rule has been repeated innumerable times.' "(51)

Applying this principle to the instant case, it is somewhat difficult to understand upon what theory the Commissioner

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(50) Record, page 16.

(51) Vol. I, Fed. Stat. Ann., Sec. Ed., p. 46, quoting from Washington Market Co. v. Hoffman, 101 U. S. 115, 25 L. ed 782, quoted with approval in U. S. v. Lexington Mill, etc. Co., 232 U. S. 399, 58 L. ed. 658; and numerous other cases.

can interpret the language of Section 1310 (c) which provides that "the taxes imposed under the provisions of Titles * * * VII" as meaning the taxes imposed under Section 703 of Title VII. The word "title" is commonly used in federal legislation to denote a division of an act; the word "section" denoting usually a subdivision of a title. It is clearly contrary to the accepted rules of statutory construction to restrict the application of a law to one particular section where the language is susceptible of including other sections. This seems to be true even where the language is part of a particular section.

Again quoting from Federal Statutes Annotated:

> " 'What possible difference can it make in the construction of a statute that there is a subdivision into sections,' said Mr. Justice Story. 'Statutes are construed by the import of the words,' he continued, 'and not by the mere division into sections or periods or sentences. The intention of the legislature does not break itself into sections. It is to be drawn from the entire corpus of the act and not from single passages. If then a clause is found in one section which in its general language and import is equally as applicable to other sections and provisions of the same act as it is to the very section in which it is found, if the main objects of those sections and the true intent and policy of the act will be best promoted by reading it as applicable to those sections * * * there is very strong ground to say * * * that as its language is appropriate so it shall be construed as intending to include them.' "(52)

If this be true, where a clause or provision in one section may reasonably be interpreted as intended to apply to other sections, *a fortiori*, where a provision in terms refers to a title including several sections to which it may reasonably

(52) **Vol. I, Fed. Stat. Ann. 2d Ed., p. 45.**

apply it, can it be said that Congress intended to limit its application to one of such sections?

It must be presumed that had Congress intended to limit the application of Section 1310 (c) to Section 703 of Title VII, it would have used language appropriate to this purpose. In numerous cases a proposed construction which would unwarrantably contract or expand the meaning of the legislature has been rejected by the court upon the declared presumption that the legislature would have expressed what "it would have been easy to say" had it had such an intention. For a long line of cases on this point see Federal Statutes Annotated, Second Edition, Volume I, page 41.

THE CIRCUMSTANCES UNDER WHICH SECTION 702 BECAME A LAW AS DISCLOSED BY THE LEGISLATIVE RECORDS OF CONGRESS INDICATE NO INTENTION ON THE PART OF CONGRESS TO CREATE A NEW FORM OF TAXATION ON CIGARETTES NOT REFUNDABLE IN THE CASE OF THEIR SUBSEQUENT EXPORTATION.

Section 702 is not a new form of statute. In substance it is a reenactment with some slight modifications of a similar provision which was incorporated in the Revenue Act of 1917, and which reads as follows:

> Sec. 403. That there shall also be levied and collected upon all manufactured tobacco and snuff in excess of 100 pounds or upon cigars or cigarettes in excess of 1,000 pounds which were manufactured or imported and removed from factory or customhouse prior to the passage of this act, bearing tax paid stamps affixed to such articles for the payment of the taxes thereon, and which are on the day after this act was passed, held and intended for sale by any person,

corporation or association and upon all manufactured tobacco, snuff, cigars or cigarettes removed from factory or customhouse after the passage of this act but prior to the date when the tax imposed by Section 400 or Section 401 upon such articles takes effect, an additional tax equal to one-half the tax imposed by such sections upon such articles."(53)

It will be observed that the only differences in substance as between Section 403 of the Revenue Act of 1917, and Section 702 of the Revenue Act of 1918 are

(a) That Section 403 of the Revenue Act of 1917 imposes a tax equal to one-half of the increase in the amount of taxes on cigarettes imposed by the Revenue Act of 1917, whereas Section 702 of the Revenue Act of 1918 imposes a tax on such cigarettes equal to the full amount of the increase in taxes on cigarettes imposed by the Revenue Act of 1918.

(b) This tax in Section 403 of the Revenue Act of 1917 is referred to as an "additional" tax, whereas in Section 702 of the Act of 1918 it is referred to as a "floor" tax.

While the Appellant seems to attach great importance to this, the proceedings in Congress at the time Section 702 was under consideration will clearly show that no special significance is to be attached to the designation of this tax as a "floor" tax.

At the hearing before the Committee on Ways and Means to which this bill was referred (54) a statement was presented by Mr. F. W. Taussig, Chairman of the

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(53) 40 S. L. 313.

(54) Hearings No. 25 before Committee on Ways and Means, House of Representatives, with reference to revenue bill then under consideration which later became 1918 Revenue Act, held July 15, 1918; statement of Mr. F. W. Taussig, Chairman, U. S. Tariff Commission.

United States Tariff Commission, in which he advocated the adoption of some form of legislation similar to that adopted in European countries, known generally as "padlock legislation" by which when the ministry of finance or the corresponding official body proposed an increase of custom duties or internal revenue duties, those taxes are put into effect at once by provisional levy.

To accomplish this purpose it was suggested that a provision might be incorporated in the then pending bill to the effect that "after the date on which the bill is reported to the house any one withdrawing distilled spirits from a bonded warehouse shall be called upon to give bond for such tax as shall finally be levied." The manifest purpose of such a provision was to prevent the taxpayer from escaping payment of the proposed increased tax by withdrawal from bond of distilled spirits or from the factory of tobacco and other such articles in anticipation of the passage of the bill.

After describing this so-called "padlock legislation," Mr. Taussig stated *inter alia:*

> "Now, I wish to refer briefly to the alternative method of dealing with this situation. The so-called *floor tax* which was first introduced in the Spanish War Revenue Act of 1898, and which as you know is in effect now with reference to taxes on distilled spirits and tobacco, the floor tax is virtually retroactive. It is made applicable after the commodity has already entered the channels of trade. It is in effect a substitute for padlock legislation and with reference to the taxes imposed upon distilled spirits and tobacco it has proved to be a surprisingly effective substitute." (Italics ours.)

The statute dealing with this situation at the time this statement was made was Section 403 of the Revenue Act

of 1917, quoted *supra*. As we have seen this statute, like the Revenue Act of 1898 (55), referred to the tax imposed as an "additional" tax and not as a "floor" tax. Throughout the discussion before the committee, however, this form of legislation was referred to as a so-called floor tax and it is, therefore, natural that in re-enacting in substance Section 403 of the Revenue Act of 1917, the language "floor" tax should have been used.

Mr. Taussig was obviously under the impression that some such language had been used in the 1898 and in the 1917 Revenue Acts, and the committee hearings show that he was requested by the committee to draw this particular provision of the bill which became the Revenue Act of 1918 (56).

Under these circumstances it is manifest that no special significance can be attached to the designation of this tax as a floor tax. As stated by Judge Nott of the Court of Claims in the case of Upton vs. the United States (57):

> "In this country where statute law is the hurried work of over-busy individuals, very little importance can be attached to the accidents of phraseology. Every year of judicial experience renders plainer the fact that judges to interpret aright must put themselves in the position of the legislators who made the statute and gather from its general purpose the meaning of its obscurer parts."

Applying this rule to the instant case it is at once obvious that the purpose of Congress, as shown by the context and by a consideration of the circumstances under which this bill was passed, was not to create a new form

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(55) 30 S. L., 449—appendix, p. 60.
(56) *Vide supra*, **note 54.**
(57) 19 Ct. Cl. 49.

of taxation on cigarettes not refundable in the case of their subsequent exportation but merely to prevent the manufacturer of cigarettes from escaping the increase in the amount of the tax provided by Section 700 of the Revenue Act of 1918 by removing his cigarettes from the factory in anticipation of the passage of the then pending bill.

It is hardly necessary to cite authority for the well-established rule that in the construction of a statute that exposition ought to be adopted which carries into effect the true intent and object of the legislature in its enactment.(58)

In determining the intent of the legislature or the meaning of a statute, as stated by Mr. Justice Davis in the case of Heydenfeldt vs. Daney Gold, etc., Co. (59):

> "There is no better way of discerning its true meaning than by considering the necessity for it and the causes which induced its enactment."

As we have seen, the necessity for Section 702 was to accomplish the same purpose that is accomplished under the so-called padlock legislation in use by European countries and to prevent escape from proposed increased taxes.

UNEQUAL OPERATION UNDER APPELLANT'S INTERPRETATION.

Another rule of statutory construction which may be reasonably invoked in the present case is that "nothing but clear and unmistakable language will warrant a court in a construction which will produce injustice by the un-

(58) See Vol. I, Federal Stat. Ann., Sec. Ed., p. 35, for long line of U. S. Supreme Court and other authorities.
(59) 93 U. S. 638; 23 L. ed. 995.

equal operation of the statutes. Tax laws should not be construed as requiring any one to contribute more than his just share of the public burdens in the absence of an express declarations to that effect." (60)

The obvious purpose of Section 3386 U. S. Revised Statutes and Section 1310 (c) of the Revenue Act of 1918, as we have seen, is to prevent the imposition of taxes on cigarettes exported and to insure the refund of taxes paid on cigarettes withdrawn for domestic consumption and sale when such cigarettes are exported. If these sections in their relation to Section 702 are construed in accordance with the Commissioner's ruling the result will be to require certain manufacturers and exporters to pay a tax of $0.95 per thousand on cigarettes exported while other manufacturers and exporters are exempted from this tax.

Under the Commissioner's ruling an exporter purchasing cigarettes from a manufacturer withdrawn from the factory prior to February 25, 1919, would be required to pay this tax of $0.95 per thousand if the cigarettes were held and intended for sale on February 25, 1919, although they were subsequently exported. Another exporter purchasing cigarettes withdrawn from the factory after this date would not be required to pay this tax.

In like manner one manufacturer withdrawing cigarettes from the factory as in the instant case before February 25, 1919, and holding them for sale on that date would have to pay this tax of $0.95 per thousand and would not be entitled to have it refunded when such cigarettes were subsequently exported, while another manufacturer withdrawing cigarettes on February 26, 1919, having paid this tax

(60) 1 Fed. Stat. Ann. Sec. Ed., p. 95—and see collection of cases on this point.

of $0.95 per thousand, would be entitled to have it refunded upon subsequent exportation of such cigarettes.

The result, therefore, would be to require certain exporters and manufacturers to pay taxes of $0.95 per thousand on cigarettes although such cigarettes are actually exported, while other exporters and manufacturers would be exempt fom this tax. A construction leading to this result is clearly contrary to the rule stated above.

PAYMENT OF TAX UNDER PROTEST AS CONDITION PRECEDENT TO SUIT.

We submit that the Court of Claims properly held that the circumstances of this case are such that it was not necessary as a condition precedent to the prosecution of this suit that the appellee should have made formal or informal protest at the time of the payment of the tax. Counsel for appellant, however, have raised this point in their brief and while we are still of the opinion that such a protest was unnecessary we are nevertheless unable to agree with the contention of appellant's counsel that the facts in this case justify the assumption that payment of the so-called floor tax was voluntarily made.

We differ with the conclusion of law reached by appellant's counsel that the circumstances under which the payment of this tax was made constitute a "voluntary payment" of taxes within the meaning of that language as used in the authorities relied upon by appellant.

In replying to points raised in appellant's brief, we shall endeavor to show:

(1) That payment in fact was made under protest and not voluntarily.

(2) That the cases relied upon by defendant which require payment to be made under protest as a condition

precedent to the maintenance of a suit for the recovery of taxes illegally assessed and collected have no application to the case at bar;

(a) because the right of drawback or refund in this case is claimed under a special statute and not under the general refunding statute;

(b) because the facts in the cases relied upon by defendant are in no sense analagous to the facts in the case at bar.

PAYMENT MADE UNDER PROTEST.

The record in this case shows that on August 19, 1919, petitioner contracted for the sale and exportation of the cigarettes involved in this case (record p. 6). Whatever may have been their previous status from that date these cigarettes were held and intended for export and not for domestic consumption or sale and the right of drawback or refund then accrued. Prior to this date, that is to say, on August 5, 1919, appellee's representative conferred with the Solicitor of Internal Revenue for the purpose of ascertaining whether taxes paid would be refunded if negotiations then pending were consummated and the cigarettes were exported and sold abroad (record p. 4). On the following day, that is, on August 6, 1919, appellee confirmed in writing its request for this ruling. On August 22, 1919, three days after the contract for sale and exportation of the cigarettes had been made the Acting Commissioner advised appellee by letter that the amounts paid as a so-called floor tax (that is, 95 cents per thousand) could not be included as an allowance for drawback on cigarettes sold for export (record p. 6).

It will thus be observed that prior to the sale and exportation of these cigarettes and before the right of refund or drawback had accrued a preliminary request was made by

appellee for a ruling as to its rights in the premises. Obviously it could not assert any claim for refund or drawback until that right had accrued. Up to this time the tax involved in this suit had not been paid but in compliance with requirements of the Treasury Department bond had been given secured by $482,000 United States Liberty Bonds for the payment of this tax seven months after the passage of the Revenue Act of 1918 (record p. 8.) The Revenue Act of 1918 became effective February 25, 1919. The tax here involved, therefore, became payable September 25, 1919.

After the exportation of the cigarettes had begun, when the right of refund or drawback had accrued and before the tax had become payable under the terms of the bond, sundry formal claims for drawback were filed, executed on the forms regularly prescribed by the Commissioner (record p. 8). These claims were not officially acted upon by the Commissioner until March 15, 1920 (record p. 8). When therefore the tax was paid in September, 1919, claims for drawback were still pending. At that time the Government held as security for its payment Liberty Bonds in the amount of $482,000. Regulations of the Department for presentation of claim had been complied with and appellee was awaiting the decision of the Commissioner.

Under these circumstances it would have been an idle formality for appellee to have filed any additional protest or notice with the Collector when the tax was actually paid. The Collector was without authority to refund or abate this tax. The power to authorize its drawback or refund was vested in the Commissioner and the case was then pending before him. To avoid the risk of having the Commissioner or Collector sell the $482,000 in Liberty Bonds belonging to appellee it was necessary to pay the tax, to recover these

bonds and to await the decision of the Commissioner on claim filed.

On March 15, 1920, six months after the payment of the tax, the Deputy Commissioner notified the Collector that claim for refund or drawback of $2.05 had been allowed but claim for 95 cents additional tax had been disallowed and the Collector was directed to notify appellee of this action (record p. 8). Thereafter appellee continued with all due diligence to prosecute its claim for refund of the 95 cents per thousand disallowed. The decision of the Deputy Commissioner was appealed from and the case argued orally and on brief (record p. 9). On February 28, 1921, the Acting Commissioner in a letter addressed to counsel for appellee affirmed the ruling of the Deputy Commissioner (record p. 9). A reconsideration was then applied for and the attention of the Commissioner and of the Solicitor of Internal Revenue was called to certain statutes which had not been considered on the first hearing (record pp.). A rehearing was granted and the case again argued orally and on brief (record pp. 12 & 13) and under date of March 8, 1922, a final ruling was made by the Commissioner of Internal Revenue disallowing the claim (record p. 14). This suit was thereafter instituted within the time prescribed by statute.

It thus appears:

(a) That before the right of drawback or refund accrued a preliminary ruling was applied for.

(b) That when the right of drawback or refund had accrued and before the actual payment of the tax formal claim for drawback or refund was filed.

(c) That at the time actual payment was made formal claim for drawback or refund was still pending and to avoid the sacrifice of security payment was necessary.

(d) That upon final disallowance by the Commissioner

of Internal Revenue within the statutory limit prescribed by Congress suit was instituted for the recovery of this tax.

It is respectfully submitted, therefore, that this tax was not paid voluntarily and without protest but on the contrary all regulations of the Department and all statutory requirements were fully complied with, the Commissioner had due notice at the time the tax was actually paid that appellee protested its collection; and payment in effect was made under duress.

CASES RELIED UPON BY APPELLANT NOT APPLICABLE TO CASE AT BAR.

In support of the contention that protest must be made at the time of payment of the tax as a condition precedent to the recovery of the tax here involved, appellant relies primarily upon the cases of Cheesebrough *v.* United States, 192 U. S. 253; United States *v.* New York and Cuba Mail Steamship Company, 200 U. S. 488; and Eli Bernays *v.* United States, 208 U. S. 614.

Cheesebrough v. United States

In the Cheesebrough case the facts briefly were that on the 5th day of June, 1900, Robert A. Cheesebrough, pursuant to an agreement made in May of that year, executed and delivered a deed to certain property to the Cheesebrough Building Company. At that time the Act of June 13, 1898, was in force which required, *inter alia*, stamps to be purchased and affixed to deeds. In compliance with this provision of law stamps were purchased, and affixed voluntarily and without any protest. Nearly two years thereafter, that is to say, on January 9, 1902, application was made for refund of the value of these stamps on the ground that the

act under which the tax was collected was unconstitutional. This refund was claimed under Section 3220, 3226, 3227 and 3228, Revised Statutes, Section 3220 having been originally enacted July 15, 1866 (14 S. L. 111), and having been amended by the act of December 24, 1872 (17 S. L. 401).

FACTS NOT ANALOGOUS TO CASE AT BAR

It will be noted that in this case claim was based upon the unconstitutionality of certain provisions of the Revenue Act of 1898, that it was asserted under a general statute authorizing refund of taxes illegally collected and not under a special statute authorizing refund of the particular taxes paid and that the taxpayer made no claim for refund and did not question the legality of the tax until nearly two years after the tax was paid. The facts are, therefore, by no means identical with or analogous to the facts in the case at bar.

As we have shown in the case at bar appellee asked for a preliminary ruling before its right of refund had actually accrued, filed its claim for refund or drawback when it had accrued, and has diligently prosecuted its claim since that time. If, therefore, appellee's claim had been asserted under authority of this general statute as it read at the time the Cheesbrough case was decided, it is submitted that the court should not dismiss it on the ground that the taxes involved were voluntarily paid. *A fortiori,* if the claim in this case was asserted under the general statutes involved as since amended, the defense of lack of protest at the time of payment should not prevail.

GENERAL REFUNDING STATUTES AMENDED SINCE CHEESEBROUGH DECISION

Section 3220 as it read at the time the Cheesbrough case was decided provided in part that

> "The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, *on appeal made to him*, to remit, refund and pay back all taxes erroneously or illegally assessed or collected." (Italics ours.)

As amended by the Revenue Act of 1918 (Sec. 1316) this provision reads:

> "The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected."

the phrase "on appeal made to him" having been eliminated.

Section 3226, as originally enacted, provided in part that

> "No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * *until appeal shall have been duly made to the Commissioner of Internal Revenue*, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, * * *." (Italics ours.)

The language "until appeal shall have been duly made to the Commissioner of Internal Revenue," was eliminated when this section was amended by the Revenue Act of 1921 (Sec. 1318).

It will be observed that in the Cheesbrough case the court in holding that protest at the time of payment was necessary emphasized the fact that Section 3226, *supra*, required an appeal to be made to the Commissioner. On this point the Court said:

> "The words 'until appeal shall have been duly made' appear to us to imply an adverse decision by the Collector, at least a compelled payment, or official demand for payment, from which appeal is taken.

"In Stewart *v.* Barnes, 153 U. S. 456, this Court treated the language as providing for 'an appeal' and we think correctly. * * *"

In view of the reasoning of the Court, which presupposes an appeal from the decision of the Collector, the elimination of this language from Section 3220 and 3226 Revised Statutes, has special significance. These amendments become more significant when we consider the history of the requirement that such cases should be first appealed to the Commissioner.

Necessity for Protest Under Earlier Statutes and Decisions

As shown in the footnote to the case of Hvoslef *v.* United States (237 U. S. 1), in Annotated Cases 1916 A p. 291, which we shall later discuss, under the common law the remedy of the taxpayer where taxes were illegally assessed and collected was an action of *assumpsit* against the Collector. (Philadelphia *v.* Diehl, 5 Wall. 720, 18 U. S. (L. ed. 614.) In order to protect the Collector the law required, as a condition precedent to the recovery of the amount paid, that the taxpayer must give notice to the Collector at the time of its payment that he protested against the legality of the tax in order that the Collector might withhold from the Government the amount in dispute until the claim was adjusted. (Arnson *v.* Murphy, 109 U. S. 238, 3 S. Ct. 184, 27 U. S. (L. ed.) 920). Accordingly, when internal revenue collectors were required by statute to pay their collections into the Treasury at the end of each month it was necessary to provide for some method by which both the Collector and the taxpayer could be protected in the case of an illegal or erroneous assessment or collection of internal revenue taxes. (Philadelphia *v.* Diehl, 5 Wall. 720, 18 U. S. (L. ed.) 614.)

It, therefore, became necessary to vest in the Commissioner the right to make these refunds. Section 3220 Revised Statutes was one of the earliest general statutes authorizing refundment of taxes illegally collected. As originally enacted it has unquestionably been construed as vesting a wide discretion in the Commissioner in the matter of refunds and as requiring claims to be first presented to and considered by him. It was intended to deal with collections erroneously or illegally made and empowered the Commissioner by refund to correct such errors. It was construed by the courts as vesting this power in the Commissioner rather than vesting a right of refund in the taxpayer. It, therefore, essentially differs from special statutes which give to the taxpayer a right of drawback or refund of specific taxes. The principles applicable to the claims filed under authority of this section are by no means applicable to claims filed under special drawback or refundment statutes. This becomes apparent from a further analysis and consideration of the decision in the Cheesebrough case.

From a further analysis of this case it will be observed the decision of the court did not rest merely upon the fact that the taxpayer failed to give notice of protest at the time of payment or failed to comply with any technical requirement of law, but rather upon the fact that the petition failed to show that the case at the proper time had been properly submitted to and considered by the Commissioner. On this point the court says:

> This petition did not set up any ruling of the Collector, either specific or resulting from a demand to which petitioner yielded under protest or with notice, and from which he appealed to the Commissioner, but averred that he "made a written application" to the Commissioner to refund the amount he had paid.

> We do not say that this was not sufficient to justify action by the Commissioner, but the averment as it stands is not equivalent to stating a previous adverse decision appealed from. The inference is that the application was a mere afterthought, and, if an afterthought, the payment was voluntary.
>
> The Commissioner might nevertheless have allowed the claim and doubtless would have done so, in the interest of justice if there were no particular circumstances to discredit it, and the law had been held unconstitutional by this court.

In the case at bar the record shows that the Commissioner did make a specific ruling on the question involved both prior to and after payment of the tax; that the case was not only considered once but was thereafter reconsidered by the Commissioner and Solicitor of Internal Revenue, and a final ruling made allowing part and rejecting the balance of appellee's claim. The record further shows that there were "no particular circumstances to discredit" this claim but on the contrary the Acting Commissioner expressed the opinion that it would be desirable to make refund of the amounts claimed (record p. 7). The facts in this case are so clearly distinguishable from the facts in the Cheesebrough case we submit that the decision in the Cheesebrough case cannot be held to apply to the case at bar.

United States v. New York & Cuba Mail Steamship Company

In this as in the Cheesebrough case the right of refund was claimed under the general statute referred to without notice of protest and in reliance upon the unconstitutionality of the act imposing the tax.

Eli Bernays v. United States

Reference is made to the fact that in this case the judgment of the Court of Claims was affirmed upon authority of

the two cases above referred to. As this case was dismissed by the Court of Claims without any opinion being filed and the same course was adopted by the Supreme Court, the decision in this case can hardly be taken for authority that the facts in the case are in any sense analogous to the facts in the case at bar.

DECISIONS OF THIS COURT DEALING WITH SPECIAL STATUTES AUTHORIZING REFUND.

United States v. Jones

In the case of *United States v. Jones*, 236 U. S. 105, suit was brought to recover taxes paid under Secs. 29 and 30 of the Act of June 13, 1898 (30 S. L. 488, C. S. 1913, Sec. 1634). In that case the Collector of Internal Revenue collected from an administrator without protest a succession tax upon the distributive shares of certain beneficiaries and the tax was covered into the treasury. About seven months thereafter application was made to the Secretary of the Treasury for refund but this application was denied and suit was brought in the Court of Claims which gave judgment for the applicant (49 C. Cl. 408). This judgment for the applicant (49 C. Cl. 408). This judgment was affirmed by this Court in a decision rendered January 25, 1915.

United States v. Hvoslef

In the still later case of *United States v. Hvoslef*, decided March 22, 1915 (237 U. S. 1), claimant had paid without protest certain stamp taxes on charter parties and subsequently brought suit to recover under authority of Compiled Statutes of 1913, Sec. 6370, which provided in part that

> "All claims for the refunding of any internal revenue tax alleged to be erroneously or illegally assessed and collected under the provisions of Section

29 of the Act of Congress approved June 13, 1898, known as the War Revenue Act, or of any sums alleged to have been excessive or in any manner wrongfully collected under the provisions of said act, may be presented to the Commissioner of Internal Revenue on or before the first day of January, 1914, and not thereafter.

"Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the act aforesaid."

In defense of this suit the Government contended, *inter alia*, that the lower court had erred in ruling that it was not necessary for the claimant to aver or prove that the tax was paid under protest.

This Court in discussing this question, after reviewing the several statutes dealing with this subject, said, *inter alia:*

"It is also apparent, in the light of the manifest purpose and scope of the legislation to which we have referred, that the contention based upon the absence of protest cannot be sustained. Where taxes have been illegally assessed upon the 'contingent interests' described in the refunding act of 1902 it has been held that recovery may be had although the taxes were paid without protest. United States *vs.* Jones, *supra*. In the acts of 1907 and 1909, *supra*, with respect to stamp taxes on 'export ships' manifests' and on foreign bills of exchange against exports, Congress expressly provided for refunding whether the taxes had been paid under protest or not. The fact that these express words were not repeated in the act of 1912 cannot, in view of the nature of the subject, be regarded as evidencing a different intent; rather must this act

receive in this respect the same construction as that which has been given to the act of 1902. If it appeared that the sums sought to be recovered were not legally payable, and the claim was duly presented within the time fixed, the right to repayment was established by the express terms of the statute."

Greenport Basin & Construction Co. v. United States
Young v. United States, 269 Federal 58

In these cases, decided November 18, 1920, by the District Court for the Eastern District of New York the court held that under Section 252 of the Revenue Act of 1921 (which authorizes the refund of income, war profits and excess profits taxes paid in excess of the amount properly due under the Revenue Act of 1918—one of the acts involved in the present case), the refund authorized is a matter of right without proof of duress or of protest, citing the case of United States *v.* Hvoslef, *supra*. In discussing the question of protest the court said:

> "Even if it were necessary to plead duress or protest the petition or complaint sets forth that the defendant computed the tax under compulsion of the regulations and filed a claim for abatement of the taxes assessed before payment. This complies with every requisite of payment under protest" (citing Cheesebrough *v.* United States, *supra*, and City of Philadelphia *v.* Collector, 5 Wall. 720).

Continuing the court said:

> "The government urges that it is necessary to make a protest at the time of actual payment but it seems to the court that this would be a useless requirement. The objects of the protest are to define the taxpayer's attitude and to notify the government thereof. These have been fully accomplished by the objection of the taxpayer when the computation was made and by the filing of his claim."

The language of the court is peculiarly applicable to the facts in the present case. Under compulsion of the Department's regulations a bond with adequate security for the payment of the tax within seven months after the passage of the Revenue Act of 1918 was filed by the taxpayer. Formal claims for refund were filed on forms prescribed by the Department before the actual payment of the tax.

Borrowing the language of the court, certainly "this complies with every requisite of a payment under protest," since, according to the definition prescribed by the court, "the objects of the protest are to define the taxpayer's attitude and to notify the government thereof." The record in this case abundantly shows that the government was fully advised as to the attitude of the appellee.

It thus appears that under the later decisions of this Court and of other federal courts, in suing to recover taxes under the more recent revenue acts which give the taxpayer a right to refund and especially under those which provide for the refund or drawback of particular taxes, it is not necessary to plead or to prove that payment of the taxes sought to be recovered was made under duress or under protest. It further appears that under the more recent decisions of the federal courts the facts in this case as disclosed by the record, meet the requirement, if it can be said to exist, that payment must be made under protest or under duress, it being evident that the Commissioner had due notice of the attitude of the taxpayer and it further appearing that by reason of the deposit of $482,000 in Liberty Bonds the appellee was forced to make the payment of the taxes involved in this case or to run the risk of losing the collateral security deposited by appellee under regulations of the department.

PAYMENT OF FLOOR TAX NOT MADE BEFORE EXECUTION OF THE CONTRACT FOR SALE OF THE CIGARETTES ABROAD.

We have thus far endeavored to show that this case is not one in which it is necessary to plead or to prove that the payment of taxes involved was made under protest or under duress. We have also endeavored to show that if the court should reach a contrary conclusion this requirement has been met.

Inasmuch as this case was submitted on an agreed statement of facts and there was no controversy as to what the actual facts are, we confined our discussion primarily to the legal questions involved, assuming that no difference of opinion existed as to what the facts proved. Counsel for appellant, however, in claiming that payment of the tax here involved was "voluntarily" made have placed an interpretation upon the facts disclosed by the record which seems to us to be wholly unjustified. They have also indulged in certain "assumptions" which we contend are not supported by the record in this case and to which it is necessary to direct the court's attention.

With all due deference we take exception to the statement of counsel for appellant that some time after appellee had voluntarily paid the floor tax it was found desirable, doubtless for reasons of commercial advantage, to export these cigarettes. As we have already pointed out the record shows that the contract for the sale and exportation of these cigarettes was entered into in August, 1919, whereas the floor tax did not become payable under the terms of the bond until September of that year. This statement of counsel must, therefore, be based upon the assumption that the execution of the bond for the pay-

ment of the tax seven months after the passage of the act constituted a voluntary payment of the tax. This is a conclusion of law with which we are unable to agree. It should require no citation of authority to support the proposition that an agreement to pay at a future time cannot be treated as payment even though collateral security for the performance of the agreement is required and deposited.

OTHER UNAUTHORIZED ASSUMPTIONS.

We likewise take exception to statement of counsel for the appellant to the effect that it is fair to assume that the export price received by appellee was sufficiently large to allow not only a greater profit than would have resulted from domestic sale but was enough to cover a liberal allowance for expenses and taxes, including the floor tax. No evidence has been presented in this case to show what amount was received or what profit was made on the cigarettes in question. The record is silent on this point and the "assumption" of appellant's counsel is wholly without support.

We submit that evidence on this point would have been irrelevant and immaterial. The fact, if it is a fact, that appellee received a larger price for the cigarettes by reason of their exportation than it would have received if sold for domestic consumption, could have no possible bearing on the case here involved.

In the case of *United States vs. American Tobacco Company*, 166 U. S. 469, the Commissioner of Internal Revenue refused to reimburse the owner for unused stamps which had been destroyed on the ground that the value of the stamps had been recovered under an insurance policy. The court held that this was no bar to a recovery from the government.

In the instant case there is no claim that the floor tax as such was paid to the appellee by someone else but counsel for appellant merely assumed that the profit made on the sale of the cigarettes was sufficient to reimburse appellee for the amount paid. We submit that even had the appellee added to the sale price an amount equal to the floor tax, or, to take a more extreme case, even if one of the conditions of the sale had been that the purchaser would pay the floor tax, under the decision in *United States v. American Tobacco Co., supra*, this would have been no bar to recovery against the government. Certainly in the absence of any such payment it is immaterial what amount was received by appellee in the sale of the cigarettes here involved.

CONCLUSION.

In conclusion we submit

(1) That the so-called "floor tax" is not a new form of unrefundable tax.

(2) That Congress has consistently authorized the refund of taxes paid on cigarettes intended for domestic consumption upon their subsequent exportation and nothing in Section 702 nor in any other statute now in force justifies the conclusion that Congress intended to depart from its established policy in this respect.

(3) That considering merely the language of the act and the context, it is clear that Congress did not intend by Section 702 to create a new form of unrefundable tax; and if ambiguity is deemed to exist the application of accepted rules of statutory construction lead to the same conclusion; and since the intention of Congress is and must be the determining factor we respectfully submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

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